

timecards, payroll records, or other evidence in support of its position. Further, it did not explain the timing of the change, which coincided with its learning about union organizing at Jacksonville. Thus, we affirm the judge's determination that the Respondent's introduction of new reporting procedures revoked its existing policy in violation of Section 8(a)(3) and (1) of the Act.

2. We also agree with the judge's conclusion, pursuant to *Wright Line*, supra, that Respondent EDS violated Section 8(a)(3) and (1) of the Act on October 11, 1988, when it subcontracted its Jacksonville courier work to SCI-Tyler and terminated its Jacksonville courier drivers.

The Respondent denies that these actions violated the Act. It contends that for valid business reasons it decided upon its course of action in July 1988 before union organizing began. Thus, it contends that implementation of its decision shortly after it learned about the union activity was an unrelated coincidence.

As the judge found, the General Counsel established the following facts in support of his prima facie case of a violation. The Respondent had explicit knowledge of the union activity at Jacksonville on September 15, when it received the Union's notification letter. It did not decide to subcontract the Jacksonville courier work and terminate the Jacksonville drivers until September 22, 1988, 1 week after it had received notice of union organizing at Jacksonville. Before the Respondent could transfer the courier work to SCI-Tyler, it had to resolve an intractable issue which until then had precluded a decision to transfer the work—the significant additional cost of performing the Jacksonville work at Tyler.⁶ Further, the Respondent took no concrete steps to implement its Jacksonville decision until the holiday weekend before the October 11 implementation date.

We conclude that the timing of the Respondent's decision and its implementation strongly support an inference of unlawful motive. Further, shortly after the Respondent learned of the union activity at Jacksonville, it unlawfully disciplined courier Stanwood, named in the Union's September 14 letter as an activ-

⁶SCI-Tyler operated as a regulated common carrier subject to tariff rates. MTech limited its courier services to customers incident to data processing services. So limited, it considered itself exempt from regulation. It had been determined that the additional cost to perform Jacksonville courier work out of SCI-Tyler would be approximately \$20,000 a month for an indeterminate period of time because of the tariff rate. We agree with the judge that the Respondent's contention that the additional cost was not a significant factor in its decision—because the debit to one entity of the Company would “wash out” as a credit to another entity—is not credible, in light of the record.

ist. It also discontinued its practice of allowing couriers to clock in and be paid each day for 15 minutes prior to dispatch. Thus, the timing of the Respondent's conduct in concert with its other unfair labor practices is sufficient to warrant an inference that a motivating factor for the Respondent's conduct was its desire to escape the nascent union organizing drive.⁷

Once the General Counsel presented his prima facie case, the burden was on the Respondent to demonstrate that it would have subcontracted the Jacksonville courier work and terminated the couriers' employment in the absence of its employees' protected activity. *Wright Line*, supra. The judge found, and we agree, that the Respondent failed to meet its burden. The Respondent contends that it made a valid business decision well before union organizing began at Jacksonville.

We have already found, in agreement with the judge, that the Respondent did not reach its decision to end courier operations at Jacksonville until after it had learned of the Union's organizing effort. The Respondent contends that its motive for transferring the Jacksonville courier operation to SCI-Tyler was to increase corporation efficiency by specialization and to parlay its acquisition of MTech and SCI into expanded business opportunities. It made no showing, however, that it had either formulated or acted in accord with a concrete business plan to increase its share of the courier business market. Further, its alleged motive is not credible in light of the substantially increased cost of performing the Jacksonville courier work at SCI-Tyler.

Finally, the Respondent contends it was under a duty to resolve an alleged violation of the Texas Motor Carrier Act at Jacksonville. It supported this contention with the legal opinion of its counsel that the Jacksonville operation was not in compliance with the law. This element of the Respondent's business justification is not persuasive, inter alia, in light of its failure to present evidence from competent authority that the Jacksonville courier operation was, in fact, illegal.

Based on the foregoing, the Respondent has failed to establish that it would have subcontracted its Jacksonville courier work to SCI-Tyler and terminated its Jacksonville couriers in the absence of the employees' protected activity. Accordingly, in agreement with the judge, we find that the Respondent violated Section

⁷We do not rely for our finding on union animus exhibited in statements made by the Respondent's low-level supervisors and agents, Chandler, Bailey, Alexander, and Dennis.

8(a)(3) and (1) of the Act,⁸ and we adopt the judge's Order, as modified.⁹

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Electronic Data Systems Corporation, and its wholly owned subsidiary, Security Couriers, Inc., Jacksonville, Texas, and Tyler, Texas, their officers, agents, successors, and assigns, shall take the action set forth in the Order.

1. Substitute the following for paragraph I,A,2(b).

“(b) Restore at Jacksonville, Texas, the courier work subcontracted effective October 11, 1988, to SCI-Tyler, including any increase in that work since October 11, 1988.”

2. Substitute the attached notices for those of the administrative law judge.

⁸We do not rely for our decision on the judge's conclusion that the Respondents' introduction into evidence of only a portion of the August 3, 1988 memorandum warrants an inference that the complete memorandum would show few locations beyond Jacksonville targeted for “leveraging” and little effort by Respondent EDS to help SCI sell its courier service to other EDS' units. This memorandum was the General Counsel's exhibit, and the record does not show that any effort was made by the General Counsel to obtain and introduce the complete memorandum. We disavow any suggestion that the incomplete memorandum warrants an inference adverse to the Respondents. Further, we do not rely on any inferences the judge drew from his speculation about “corporate protocol.”

⁹In ordering restoration of the Jacksonville, Texas courier operation, we emphasize the speculative nature of the Respondents' assertion that the Jacksonville courier operation did not comply with the Texas Motor Carrier Act. The March 14, 1988 opinion letter from Attorney Paul D. Angenand is inconclusive. The Respondents have not established that the Texas Railroad Commission or a court of competent jurisdiction has ruled that courier service as it had been conducted at Jacksonville prior to the Respondents' unlawful conduct did not comply with the Texas Motor Carrier Act. Thus, we do not order restoration of an illegal operation. Consistent with the above, we will delete from paragraph 2(b) of the judge's recommended Order the requirement that the Jacksonville courier operation be made legal. We shall permit the parties to introduce at the compliance stage any evidence that may be pertinent to the appropriateness of the reinstatement remedy, provided that the evidence was not available prior to the unfair labor practice hearing. *Lear Siegler, Inc.*, 295 NLRB 857 (1989).

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT threaten to discharge or otherwise discriminate against any of you for supporting the UAW or any other union.

WE WILL NOT threaten you with loss of your jobs and that EDS-Jacksonville will eliminate our courier operation there if you continue your activities on behalf of the UAW, or any other union.

WE WILL NOT issue formal written warnings to you in retaliation for your union activities.

WE WILL NOT discriminate against you by reducing your paid worktime by 15 minutes because you support the UAW or any other union.

WE WILL NOT subcontract our courier or other work at Jacksonville, Texas, or elsewhere there are union activities, when the purpose is to prevent a possible bargaining obligation attaching by eliminating the work, and therefore the jobs, of the employees in the potential collective-bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL revoke the arrangement, effective October 11, 1988, which we made with Security Couriers, Inc. (SCI), a wholly owned subsidiary of EDS, by which we subcontracted our Jacksonville courier work to SCI's branch at Tyler, Texas.

WE WILL restore at Jacksonville, Texas, the courier work we subcontracted, as described above, to SCI-Tyler, plus any increase in that work since October 11, 1988.

WE WILL, on reestablishing the courier work at Jacksonville, reinstate the extra 15-minute paid worktime which we removed in September 1988 from the Jacksonville courier drivers.

WE WILL offer all Jacksonville courier drivers terminated on October 11, 1988, including the 15 named below, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed; and WE WILL make them whole for any loss of earnings (including the 15 minutes removed in September 1988 from their paid worktime) and other benefits re-

sulting from their discharge, less any net interim earnings, and other benefits, plus interest:

Bonnie G. Barnes	Larry Reagan
Queen E. Chumbley	Walter P. Stanwood Jr.
Margaret Hendricks	Nila Scully
Martha J. Lance	Daniel R. Schultz
James C. Mell	Charles Samples
Ray Myrick	Clayton White
A. L. McDaniel	Kenneth Wheeler
Shawn D. Nock	

WE WILL remove from our records and files any references to their October 11, 1988 discharge, and any reference to the September 28, 1988 formal written warning issued to Walter Paul Stanwood Jr., and WE WILL notify each of them in writing that we have done so and that the discharges, and the warning, will not be used against them in any way.

ELECTRONIC DATA SYSTEMS CORPORATION

APPENDIX B

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT coercively interrogate terminated EDS-Jacksonville courier drivers, present at SCI-Tyler to interview for employment, about their sentiments regarding the UAW or any other union.

WE WILL NOT threaten to discriminate against any of you for supporting the UAW or any other union.

WE WILL NOT tell terminated EDS-Jacksonville courier drivers, present at SCI-Tyler to interview for employment, that SCI does not want the UAW, or any union, at Tyler, when the context of such remark implies that we would discriminate against union supporters.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

SECURITY COURIERS, INC.

Ruth Small, Esq. and *Elizabeth Kilpatrick, Esq.*, for the General Counsel.

George Cherpelis, Esq. and *Alice R. Moore, Esq.* and, with them on brief, *Timothy L. Salazar, Esq. (Cherpelis, Vogel, and Salazar)*, of Albuquerque, New Mexico, for the Respondents.

John Colliflower (International Rep. UAW), of Dallas, Texas, for the Charging Union.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. This is a subcontracting and discharge case. On October 11, 1988, Electronic Data Systems Corporation (EDS), discharging its Jacksonville, Texas courier drivers, subcontracted the Jacksonville courier work to the Tyler, Texas office of SCI, a wholly-owned subsidiary of EDS. Finding that the discharges and subcontracting were done by EDS in order to escape from a nascent International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO (UAW) organizing drive among the couriers at Jacksonville, I order EDS to revoke the subcontracting arrangement with Security Couriers, Inc. (SCI), restore the courier work to Jacksonville, reinstate the drivers, and make them whole, plus interest. Although I summarize the facts concerning the alter ego allegation (and would find that EDS and SCI functioned as alter egos respecting this matter), an alter ego finding is unnecessary because EDS itself made the command decisions.

This case was tried before me in Tyler, Texas, and in Dallas, Texas, on days beginning March 14 and closing April 26, 1989, pursuant to the December 9, 1988 consolidated complaint (complaint) issued by the General Counsel of the National Labor Relations Board through the Regional Director for Region 16 of the Board. The complaint is based on charges filed October 13, 1988, and thereafter amended, in Case 16-CA-13769, and on October 25, 1988, in Case 16-CA-13783, by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO (UAW or the Union), against Electronic Data Systems Corporation (EDS) and Security Couriers, Inc., (SCI), as alter egos.

In the complaint the General Counsel alleges that Respondent EDS violated Section 8(a)(1) of the Act on various dates in August and September 1988,¹ and Respondent SCI on October 24, by certain conduct, including interrogations and threats. The complaint alleges Respondents violated Section 8(a)(1) and (3) of the Act by the following conduct. Thus, EDS, in September, allegedly issued formal warnings to Larry Reagan and to Paul Stanwood; on September 26 it reduced the paid working time of the Jacksonville employees by 15 minutes; on October 11 it closed its Jacksonville facil-

¹ All dates are for 1988 unless otherwise indicated.

ity and transferred its business to its wholly-owned subsidiary in Tyler, SCI; and also on October 11 EDS terminated its Jacksonville courier drivers. On October 11 SCI allegedly required all terminated Jacksonville drivers to file applications as new employees to be considered for employment by SCI, and on and after October 11 SCI constructively refused to employ 14 named drivers terminated by EDS.

By their joint answer Respondents admit certain factual matters but deny violating the Act. For convenience, I usually refer collectively to EDS and SCI as Respondent.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

A Texas corporation with its principal office in Dallas, Texas, EDS provides data processing and data communication services to its customers throughout the United States. SCI is a wholly-owned subsidiary of EDS and maintains its principal office in Tyler, Texas. SCI transports business information for its customers from point to point. During the past 12 months EDS and SCI each provided services valued in excess of \$50,000 in States outside Texas. EDS and SCI each admits, and I find, that each is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

1. Credibility

In summarizing the evidence for this background section, I generally present the testimony as given. Keep in mind, however, that ultimately I resolve disputes in favor of the terminated drivers. Although I do so partly because the logical inferences favor the drivers, an important reason is that the drivers simply testified with a more favorable demeanor than the EDS and SCI executives and managers who testified.

2. MTech acquires SCI; EDS acquires MTech

Drive east from Dallas for about 100 miles. There, a bit south of I-20, enter the city of Tyler. Pass through, heading due south on state 69, and about 27 miles later reach Jacksonville. The employees involved in this case were employed as driver couriers at a data processing facility in Jacksonville.

Allan W. Balch has worked at the Jacksonville location since its 1976 opening. Until about October 1982 the Jacksonville facility was owned by American Data Service (ADS). Balch is one of the original owners of ADS (7:1120-

1121, 1135).² In about October 1982, Balch testified, MTech acquired ADS (7:1121). MTech is a wholly owned subsidiary of MCorp, a bank holding company (4:518; 5:618; 6:742), and one of the nation's largest data processors for banks (G.C. Exh. 23).³ After MTech acquired ADS, Balch progressed through several managerial positions at MTech-Jacksonville and eventually was appointed manager of MTech-Jacksonville reporting to James L. Gibbons (3:474; 5:642; 7:1120, 1123). There is some question as to when Balch was appointed manager of MTech-Jacksonville. Although Balch testified it was about 2-1/2 years before his April 1989 testimony (7:1120), that is, around October 1986, other references in the record suggest that Balch was the facility manager at least as early as 1985 (5:616, 627; 7:1121; 8:1229; G.C. Exh. 21). Whatever the actual date, for the purposes of this case it is clear that Balch may be viewed as the Jacksonville manager at all relevant times.

James L. Gibbons was a senior vice president and remote operations manager at MTech (3:433; 4:491). His office is at what was then MTech's corporate headquarters at Las Colinas, a business park of Irving, a suburb on the westside of Dallas. Gibbons reported to Tim Connor, an executive vice president of MTech (3:446, 450; 4:542, 545). In his MTech position, Gibbons was in charge of the data processing operations for a district which covered an area from Wichita Falls in north central Texas to Shreveport in northwest Louisiana. The territory included Jacksonville (3:474; 5:642).

SCI transports business information for its customers, the vast majority of whom are financial institutions. SCI does not perform any data processing for customers. In Texas SCI has operated as a common carrier by motor vehicle certificated, in 1974, and regulated by the Texas Railroad Commission (TRC) (6:814-816). Martin V. Coben is SCI's chairman, president, and chief executive officer. He founded the Company in 1968 (6:741, 817, G.C. Exh. 30). In SCI's early days Coben drove one of the vehicles (6:848). SCI's corporate office is located in Carrollton (4:544; G.C. Exh. 30), a suburb on the northwest side of Dallas and (I take official notice) just a few miles north of the Las Colinas business park.

According to a February 11, 1988 news release (G.C. Exh. 23), SCI serves a base of 1,000 financial institutions, most of which are located in Texas. "There are 350 Security Couriers employees located in offices in Austin, Corpus Christi, Dallas, Forth Worth, Houston, San Antonio, Sherman, Tyler, and Waco." (G.C. Exh. 23.) The focus in our case primarily is on SCI's Tyler facility, or "branch" as SCI designates its field offices.

Before moving on with our story, I must observe that the identification in the record of SCI's name is imprecise. The complaint uses Security Couriers, Inc. (which I abbreviate to SCI), and Respondent's answer is by that name. But that name does not appear elsewhere in the record. The name or names SCI actually uses are different. For example, at the beginning of his testimony, Coben answered to Security Couriers Corporation (6:740), yet the correct corporate name, as reflected on a corporate identification sheet in the record

²References to the 10-volume transcript of testimony are by volume and page.

³Exhibits are designated as G.C. Exh. for those of the General Counsel and R. Exh. for the Respondent's. The Union did not offer any exhibits.

(G.C. Exh. 30), is Security Courier Corporation (SCC), a Texas corporation incorporated August 4, 1987 (6:771-774). An employment application form (R. Exh. 8) of SCC contains, at the top right, boxes to be checked for SCC and four other firms, one being Security Couriers (a name displayed in G.C. Exh. 23, a prominent exhibit in the record). An employment application form for Security Couriers is in evidence (G.C. Exh. 36). Its 1984 date of execution by the applicant, Bonnie Barnes, predates SCC's 1987 incorporation.

It seems reasonable to infer that Coben's courier service, the one he formed in 1968, is Security Couriers, and that in 1987 Coben created SCC as an umbrella organization, or a holding company, housing Security Couriers and, apparently, three other entities. Neither party offered copies of official documents from either the corporation division of the Texas Secretary of State's office or from the Texas Railroad Commission to clarify the matter. In this decision I shall use the name given in the pleadings (SCI) to include Security Couriers as well as the corporation (SCC), unless the context indicates otherwise.

For some years before February 1988, MTech's Jacksonville facility frequently had used SCI's Tyler courier service on an as need basis (3:438; 4:546). Coben testified that for a couple of years SCI had coveted the courier business of MTech's Jacksonville operation (6:747). Acquisition discussions had been held at lower management levels of the two firms before 1987, but the first serious discussions began in early to mid-1987. On September 24, 1987, the companies reached an agreement under which MTech would acquire the assets of SCI. The agreement became final on February 11, 1988 (6:741-742, 793-794), and was marked by a public announcement in the form of a news release apparently distributed to MTech's customers (G.C. Exh. 23).

Notwithstanding the record description of MTech's acquisition of SCI as an asset purchase, Coben testified that SCI became a wholly-owned subsidiary of MTech (6:744). Clearly MTech acquired SCI, as documents, including a press release (G.C. Exh. 23), reflect. Coben refers to the acquisition as a merger (6:747). A corporate ownership summary sheet in evidence (G.C. Exh. 30) describes the acquisition by MTech as an asset acquisition, but also states that MTech owns 100 percent of SCI's stock (G.C. Exh. 30). Whatever technical distinctions exist in the acquisition, I shall treat SCI as having been, at the relevant time, an existing and wholly-owned subsidiary of MTech.

Following MTech's acquisition of SCI, no immediate change occurred affecting the courier operations of Tyler and Jacksonville (3:440, Gibbons; 6:745, Coben; 7:1123, Balch). Change did come, not from this acquisition, but in October, well after the merger of MTech into EDS.

EDS is a very large corporation (4:544; 5:594, Gibbons). With 50,000 employees worldwide (5:712, Sims), EDS provides data communication services (pleadings), or, as D. Benjamin Sims asserts, "the finest quality of product and service in the information technology arena." (5:713) Such size testimony reflects information contained in EDS's 1988 annual report. Initially that entire annual report was offered as General Counsel's Exhibit 38 (7:1012-1016), but was later withdrawn (9:1248), leaving only page 16, listing officers and directors, in evidence (G.C. Exh. 47; 9:1250). Consistent with the record evidence, and to fill it out in this area, I take official notice of two items in the 1988 annual report

(a nonrecord document). First, EDS's gross revenue for the year ending December 3, 1988, exceeded \$4.8 billion (G.C. Exh. 38 at 3, 17). Second, the same report describes the MTech acquisition in these words (G.C. Exh. 38 at 3):

During 1988, EDS' presence within the financial and insurance markets grew considerably. In April, EDS completed the acquisition of MTech, strengthening its position as the leading provider of data processing support to financial institutions in the United States.

Announced about 2 weeks after MTech acquired SCI, the acquisition by EDS from MCorp of a majority of MTech's stock was made on April 19, 1988. MCorp had owned roughly 70 to 80 percent of MTech's stock, with the other 20 to 30 percent being held by others. EDS finalized its purchase of the remaining 20 or so percent by June 30, 1988 (4:507-508, 518-519; 5:627-628; 6:796-798). Gibbons testified that after June 30, 1988, MTech, regardless of whether its legal existence ceased, no longer functioned as an entity and, at that point, became known as (a part of) EDS (4:507).

Jacksonville's courier supervisor, Robert Chandler, told the drivers that under EDS there would be no changes in the courier function, except possibly newer cars (1:103; 2:273). And, until SCI took over Jacksonville's courier operation on October 11, the EDS-Jacksonville couriers drove the same routes, used the same vehicles, and reported to the same supervision as before July 1 (1:19, 103-104; 2:173-174, 244, 324, 364-365).

D. Benjamin Sims is a division vice president of EDS (5:649). In February 1988 Sims was assigned the responsibility of coordinating the "due diligence" (verifying representations) in the acquisition of MTech. When that function ended with the April 19 purchase by EDS of all the privately owned shares of MTech's stock, Sims thereafter served as the EDS executive in overall charge of the newly acquired operations (5:655-657). During the March-April timeframe, Sims testified, he first met SCI's Coben and, in that period, they held general discussions about the opportunities SCI could provide EDS, for EDS was spending millions of dollars in Texas and around the country for courier services (5:689-690).

3. EDS wants to leverage SCI

According to Sims, early in the business analysis EDS decided it wanted to leverage SCI's presence throughout Texas and elsewhere (5:670). About late April, after the initial purchase was completed, Sims told Coben to move forward toward that goal (5:690). Coben places most of this discussion, if not all, in about late April (6:791, 794, 818, 843). During the time frame of April 19 to some point in October 1988, Coben reported to Sims (5:712; 6:752; G.C. Exh. 31). There is no memo or letter by Sims in the record describing the desire of EDS to leverage SCI. Coben's employment contract with MTech (and, thus, EDS) is for 5 years, and he has no agreement that his term will be extended (6:788-789, 847-850).

Coben did not act immediately. He testified it took awhile to get accustomed to the new corporate environment (6:758-759), and SCI had its own business to operate (6:827). Sims testified that EDS was occupied over the next several weeks with the legal steps necessary in acquiring the remaining

shares of outstanding stock and was busy with existing operations so that no new initiatives were undertaken (5:688, 691). In the May-June timeframe EDS held two meetings with its newly acquired employees at Jacksonville and Tyler to educate them about EDS, their EDS benefits, and where their group was positioned in the EDS organization. Slides were shown, charts displayed, and papers distributed (2:174-176, 199-201; 6:774-775; 7:958-959, 1126). In most of the weeks from about late April into July Sims held weekly staff meetings with the upper-level management, such as Coben, who reported to him (5:692, Sims; 6:843-845, Coben).

George Thomas Harenchar began working for EDS in about 1978 or 1979 (7:957). Sims testified he has "great faith" in Harenchar (5:693). About mid-June, Harenchar testified, Sims approached Harenchar about transferring to SCI (7:961). Harenchar apparently said yes, for he reported for work at SCI on July 11 (7:957, 961). After interviewing Harenchar, Coben hired him as vice president and general manager of SCI (6:809, 832). Harenchar's responsibilities include operations, sales, and customer service (6:962). According to Coben, he wanted someone who could manage the business. Harenchar was brought in to do that, to learn the business, and to become, to some extent, Coben's alter ego (6:813, 847-848).

4. SCI's Tyler to assume Jacksonville's courier operation

At one of his staff meetings in about early July, Sims asked Coben how he was doing with taking over the transportation needs of EDS. Coben told him he was looking at a number of places, including Jacksonville. Sims asked Coben to submit an action plan, and "encouraged" Coben to make things happen as soon as possible (5:671-672, 687-688, Sims; 6:758-762, 809-811, Coben). At that time Tim Connor, Gibbons' boss, reported to Sims (G.C. Exh. 31). If Connor was present he apparently did not later tell Gibbons of Coben's assignment. As we shall see, Gibbons learned from Harenchar.

Shortly thereafter, on Saturday, July 16, Coben met with Harenchar and the other managers reporting to him. The topic of the meeting was that of expanding SCI's operations, with Jacksonville being a big part of the discussion (6:811). Harenchar fixes that date as the first meeting he attended dealing with the consolidation of the Jacksonville and Tyler courier operations, although he recalls that it was only one of several expansion topics discussed (7:968).

Coben testified that he assigned Harenchar the task of accomplishing the takeover by Tyler of Jacksonville's courier operation. Coben does not give the date he made the assignment (6:765, 828). Coben notified Sims of Harenchar's assignment by memo (G.C. Exh. 26) dated August 3 (6:766) in which he states the assignment is made to convert the (Jacksonville) operation "to our format as of this date" with a completion date of September 3, 1988. Coben testified that by the phrase "our format" he meant that Jacksonville (EDS) would be converted into a "customer" with SCI making Jacksonville's courier runs (6:810-811). Harenchar recalls that he received the assignment from Coben about August 3 because Coben showed him the August 3 memo, or a copy of it, saying it already had been sent (6:970-972).

Coben's August 3, 1988 memorandum to Sims has particular significance to the question of whether the decision to

transfer Jacksonville's courier business to SCI (1) predates Respondent's knowledge of union activity at Jacksonville or (2) actually was prompted by the union activity. I therefore shall quote the relevant portion of Coben's memo. Coben references his memo to Sims as "Security Courier Expansion: Action to Date." (Our exhibit consists only of the memo's first page.) He begins by reminding ("As you are aware . . .") Sims that SCI has initiated efforts to expand into two major business areas:

1. Assume the administrative and managerial control of internal transportation activity within EDS data center locations where significant activity exists, *and where the change makes good business sense.* [Emphasis added.]
2. Reduce external transportation expenses throughout the corporation by managing and coordinating vendors and internal consolidations.

At that point Coben begins his report on data center courier activity, with the first location covered being that of Jacksonville, Texas, as follows (G.C. Exh. 26):

DATA CENTER COURIER ACTIVITY: Jacksonville, TX:

Jacksonville is an existing MTech location with their own courier network and encompasses approximately twenty-five courier employees. Prior to the EDS acquisition of MTech, we had attempted to negotiate with MTech personnel the assumption of control for this operation. The center manager was reluctant to release control of the revenue associated with the services. We have subsequently evaluated this operation and determined that the estimated revenue was inadequate for sustaining a viable, professional courier operation. With most of the transportation coming under regulation, the charges presently made to their customers will increase, causing an internal alteration of revenue allocations.

I have assigned Tom Harenchar the duties of converting this operation to our format as of this date. The project should be completed by September 3, 1988.

At the trial the witnesses testified that under the SCI "format," with EDS as its "customer," SCI bills EDS-Jacksonville for the Jacksonville courier work performed by SCI. Jacksonville forwards the bill to EDS accounts payable in Dallas (Plano). EDS apparently credits SCI by an accounting entry (5:580, Gibbons; 7:1164-1165, Balch). Other than being aware that SCI bills EDS, Coben does not know whether EDS pays SCI by check or by journal entry (6:784-785).

At the time of his August 3 assignment, Harenchar, who had been working for EDS in Detroit, Michigan, was in the process of selling his Detroit house and relocating to Dallas. Closing on the Detroit sale occurred in mid-August, followed by the closing on his Dallas purchase and the transportation of his belongings. In addition to these details in his personal life, Harenchar had other business assignments. Moreover, Harenchar testified that he reminded Coben of all of this on August 3. Harenchar left his meeting with Coben with the understanding the September 3 date (for completing Tyler's takeover of Jacksonville's courier work) was not extremely

important, and that it was more important the conversion be done well. As Harenchar testified, effecting the consolidation of Jacksonville was not even among his top five priority items (7:976, 1018–1019).

Because of the various delays and problems, the September 3 date had to be postponed (6:812, 829). The September 3 date, a Saturday, is significant because it was the weekend before Labor Day, a bank holiday. Because the most logical time to convert the operation would be on a weekend before a bank holiday, Harenchar and Coben discussed the fact that the next bank holiday would be Columbus Day, Monday, October 10, 1988. They therefore picked that weekend as their next target date (5:579, 641; 6:829–830; 7:997, 1003). In the meantime, however, union activity began at Jacksonville.

5. The September 15, 1988 meeting at Las Colinas

Harenchar testified that he did not contact James Gibbons or Allan Balch around the time of his August 3 assignment from Coben. Instead, Harenchar set about locating the person to whom he, in turn, would assign the duty of actually implementing the consolidation. He selected Al A. Albritton who then was the manager of SCI's Fort Worth branch office. Preliminarily, around August 8, Harenchar assigned Albritton to Dallas to work on special projects, including the project of consolidating the Tyler and Jacksonville courier operations (6:864, Albritton; 7:976–978, 1021, Harenchar). Albritton places the assignment as overall consultant (coordinator) for the consolidation as late August or early September (6:874). Indeed, an August 18 memo (G.C. Exh. 33) to Harenchar which Albritton coauthored with Perry Burnett appears to be nothing more than a "feasibility study" notwithstanding Albritton's denial that his work on the project was in the nature of a feasibility study (6:866). Perry, who did not testify, is described by Coben as an employee of SCI (6:780).

Another person brought in to assist, and initially assigned to special projects in Dallas, is Joseph A. Gipson. He places his arrival in Dallas as mid-August (9:1305–1308, 1324). Albritton testified that it was at some point after Labor Day that he told Gipson he would be part of the transition or conversion team (6:886–887). Gipson testified that he became directly involved on the weekend of October 8–9, 1988 (9:1310).

Albritton does not describe, in either his August 18 memo or in his testimony, any August or early September contacts between him and Jacksonville's Don Woods or Allan Balch. The various managerial responsibilities of Woods at Jacksonville included the courier department (1:120; 2:268; 3:449; 7:1132; 8:1204, 1238). Nevertheless, Harenchar testified Albritton informed him that, from telephone conversations with Woods plus a meeting at Jacksonville, Albritton had encountered difficulty obtaining certain information and he had learned there were problems to be resolved in any consolidation, with the chief problem being a longstanding extra cost factor of \$20,000 a month (7:980–981).

To iron out these problems, Harenchar testified, he telephoned Gibbons and arranged for the two groups (Harenchar and the SCI-Tyler faction and Gibbons and the EDS-Jacksonville faction) to meet at Las Colinas on September 15. According to Harenchar, it was at the September 15 meeting when he first informed the Jacksonville group that Ben Sims had told Coben to transfer Jacksonville's courier operation to

SCI and that Coben had assigned that duty to Harenchar (7:979–982).

Gibbons testified that Harenchar earlier had called for the dual purpose of (1) informing him that he (Harenchar) had been assigned the task of transferring the Jacksonville courier service to SCI, and (2) arranging a meeting, which they set for September 15 (4:525). Notwithstanding this testimony by Gibbons, he later testified that it was not until the September 15 meeting that he learned from Harenchar that the decision had been made to "bite the [\$20,000] bullet" and to proceed with the transfer (5:639–640). Later I describe the \$20,000 cost factor in more detail.

Attending the September 15 meeting at Las Colinas were Harenchar, Albritton, Gibbons, and Woods. Gibbons testified that it was during this September 15 meeting that he first learned of the original target date of September 3 (4:525; 6:640), but Harenchar does not recall that being mentioned (7:982). About 2 weeks earlier, as I discuss in a moment, union organizing began at Jacksonville. Although Gibbons specifically recalls that the union matter was not mentioned in this meeting, because he wanted to confer first with Woods on the subject, which they did after Harenchar and Albritton left (4:500–502), the *only* topic Albritton recalls being discussed at the meeting (and he asserts that he does not recall everything) was the union activity and what effect that activity would have on the transfer plans (6:893–895, 915). Woods did not testify. Harenchar testified that the union report came after the September 15 meeting (7:998). The \$20,000 issue remained unresolved at the close of the September 15 meeting. Recognizing that Ben Sims would have to resolve the \$20,000 issue, Harenchar scheduled another meeting for September 28 (7:995, 998, 1005). As events developed, a decision by Sims at a meeting on September 22 mooted the need for the September 28 meeting (7:999).

6. Union organizing begins at Jacksonville

In late August 1988, Jacksonville driver Walter Paul Stanwood Jr. telephoned UAW Representative John Colliflower. Colliflower said he would meet with Stanwood and other interested couriers. Colliflower and Stanwood agreed to hold the first meeting on September 13 (Tuesday) at a local Holiday Inn (2:245, 313–315), and Stanwood began telling the drivers (2:245). About 2 days before the meeting, Stanwood informed Courier Supervisor Robert Chandler of the meeting and requested permission to post a bulletin board notice to the drivers advising them of the union meeting. Chandler, who did not testify, denied Stanwood's request (2:246–247). Operations Manager Tommy D. Treadwell admits he heard about the meeting during the week before it was held, and that he confirmed this information by asking Chandler (10:1360).

Seven drivers attended the September 13 union meeting (2:246, 314). Stanwood thereafter began soliciting drivers to sign cards (2:246, 253). To protect the employees, Colliflower mailed a certified letter (G.C. Exh. 39), dated September 14, to Jacksonville manager Balch advising him of the organizing, naming seven of the employees (Stanwood was the first name) as active, reminding Balch of the drivers' statutory protection, and warning him that unfair labor practice charges would be filed if Balch violated the Section 7 rights of the employees. The return receipt reflects that the

letter was delivered to EDS at the local post office on September 15 (G.C. Exh. 39).

The seven drivers named by Colliflower in his September 14 letter are (alphabetized by column rather than listed in the order stated in the letter):

Queen Chumbley	Larry Reagan
Margaret Hendricks	Paul Stanwood
A. L. McDaniel	Clayton White
Shawn Nock	

Listing the names as I have, I show Hendricks as spelled in the record rather than the "Hedricks" of the letter. Also, in the place of McDaniel the letter types the name of "McDavid." The "vid" portion is crossed through and underneath appears, in hand, "niel" with the initials "W.P.S." Allan Balch testified Jacksonville had employed an A. L. McDaniel, but no A. L. McDavid. The General Counsel suggested that the initials are by Stanwood in an attempt to correct the spelling of McDaniel's name (7:1143). I find that EDS understood the reference to be to McDaniel.

Balch was out of town attending a convention when Colliflower's letter arrived at the Jacksonville office. When Balch called his office his administrative assistant, Donna Speck Sosby (7:1125), informed him of the UAW's letter (7:1138; 8:1230, 1233). After personally reading the letter on his return to Jacksonville, Balch telephoned James Gibbons who told him to call Paul Simms (7:1140-1141; 8:1233, Balch). Simms is the industrial relations manager for EDS (3:448, 459; 7:991). Simms explained to Balch what events were likely to transpire, asked Balch to advise him of any future correspondence he received regarding the union, and told him to do nothing respecting the Union matter (7:1141-1144; 8:1232).

When he was at the convention, Balch testified, he was informed that "something" was going on (7:1138). The "something" obviously was the union activity. This is so because on September 14, Gibbons testified, Don Woods called Gibbons to report that Woods had been informed of the union meeting held the previous evening. As Woods was scheduled to meet the next day with Gibbons at Las Colinas, Gibbons said they would discuss the matter then (3:449-451; 4:501).

Gibbons testified that after Harenchar and Albritton left the September 15 meeting, and after Woods further reported to him on what he knew of the union activity, he and Woods unsuccessfully tried to reach Paul Simms, and Woods returned to Jacksonville (3:451-452; 4:501-502). It was the next day, September 16, Gibbons testified, before he reached Paul Simms (3:452; 5:597). About that same time he also reported the union activity to Ben Sims (3:459, 463; 5:576, 659) and to Harenchar (4:502, 523). Gibbons testified that Sims told him to support whatever Paul Simms advised and, apparently, to keep Sims informed (3:460).

Testifying that he was at an airport when Gibbons reached him with the news about union activity at Jacksonville, Ben Sims asserts that they discussed the role of Paul Simms in their assessment of the ramifications of this development (5:659). According to Sims, he told Gibbons (5:660):

And I can remember a call that James and I discussed at that time that clearly strategic directions that we were heading, relative to the Security Couriers involve-

ment in the courier business in the Jacksonville center should . . . should clearly continue based upon the strategic business reasons that we had recognized, for literally months existed as the rationale for going ahead with that activity.

Gibbons denies asking Sims, in the notification call, about any impact of the union activity on the consolidation. That question was the outgrowth of subsequent conversations, Gibbons testified (3:461-462).

Coben testified that in about September Ben Sims called to tell him of the union activity at Jacksonville. Coben said that was a matter for EDS but not SCI (6:769-771, 812). Coben also testified that the topic was discussed between him and Harenchar and that he told Harenchar the union matter was an EDS problem, and was to be solved by EDS (6:830-831).

When Gibbons reached Paul Simms, they arranged for Simms to visit Jacksonville, and Gibbons then telephoned this information to Woods (3:452-453). Simms arrived at Las Colinas about (Tuesday) September 20. The next day he and Gibbons went to Jacksonville where Simms spoke with Balch, Woods, and the other managers (and supervisors, presumably), gave them some materials, and explained what they could do and could not do in a union organizing campaign. Gibbons and Simms then returned to Dallas (3:448, 455-457; 4:502-503). In the meantime, Harenchar had told Albritton to put the Jacksonville consolidation on hold until management determined what impact the union activity would have on the consolidation process (7:991).

While Gibbons and Paul Simms were in Jacksonville on Wednesday, September 21, 1988, the Union filed its petition to represent the estimated EDS couriers at Jacksonville. NLRB Region 16 (Fort Worth) docketed the petition as Case 16-RC-9078 (G.C. Exh. 18; 7:1026).

7. Ben Sims (EDS) decides on September 22, 1988, to proceed with the transfer

About the following day, September 22, Respondent's management assembled at Las Colinas where Ben Sims decided to proceed with the consolidation. The attendees included Ben Sims, Coben, Gibbons, Harenchar, Balch, Paul Simms, Attorney George Cherpelis, and perhaps an EDS staff attorney (5:576-577, 661; 7:993, 999, 1144-1145). Two issues had to be resolved in making the decision. First, the \$20,000-per-month cost factor and, second, the impact of the union organizing.

Recall that the managers (representing EDS' Jacksonville and SCI's Tyler) had been unable to resolve the \$20,000 issue at their September 15 meeting and that Harenchar had scheduled another meeting for September 28 with the thought he would have the \$20,000 issue resolved before then so they could discuss the consolidation process (7:994-995, 1005-1006). Because both factions reported to Ben Sims, it was Sims who had to resolve the \$20,000 issue. The \$20,000 issue occupies a substantial portion of the record. Because of the attorney-client privilege, the evidence as to the union impact discussion is limited to the fact that the decision was made at the September 22 meeting to proceed with the consolidation notwithstanding the union organizing activity (7:993-994, 999, 1003, Harenchar). I turn now to summarize the \$20,000 factor.

8. Biting the \$20,000 bullet

a. *Description*

The \$20,000 “bullet,” or extra cost factor each month, existed in the following respect. SCI transports items of business information for public hire. SCI was, and is, certificated as a common carrier by the Texas Railroad Commission (TRC) (6:815–816, Coben). As a regulated common carrier, SCI must charge its customers a tariff rate set by the TRC (6:820). The Jacksonville operation, under MTech and from its inception, had never been licensed by the TRC to operate as a common carrier (4:515, 516; 5:574, 618, Gibbons; 8:1223, Balch).

This difference resulted in a competitive advantage to Jacksonville because MTech, and then EDS, charged a lesser amount for its courier fee than the tariff rate imposed by the TRC on SCI (6:821). MTech officials had considered their operation as coming within an exception granted by the Texas statute (4:521; G.C. Exh. 21). As Balch candidly testified, MTech had “always done it” (8:1229). When a 1985 memo (G.C. Exh. 21) by MTech’s legal staff suggested Jacksonville’s procedure was legally questionable, MTech decided to proceed “with caution” (5:619).

SCI’s Coben had known from well before 1988 that Jacksonville was operating without a TRC license (6:826). When SCI’s Tyler Berkley conferred with MTech’s Gibbons in a series of meetings in May–June 1987 relative to the concept of SCI performing Jacksonville’s courier service, Berkley did a cost analysis of the proposal that SCI assume that responsibility. Berkley’s cost figures for SCI to do the work were some \$20,000 a month greater than MTech’s cost, with the extra cost, Gibbons testified, attributable to the tariff rates SCI would have to charge (5:631). In Gibbons’ June 26, 1987 report to Tim Connor, to whom Gibbons then reported (3:445, 473–474), Gibbons asserts that SCI’s costs were “not even close” to MTech’s (G.C. Exh. 15; 3:473). That is, SCI’s costs were much higher.

A later study was made by SCI’s Richard L. Rozzell who submitted three memorandums to Coben between February 26 and March 16, 1988 (G.C. Exhs. 27–29). Recommending against SCI’s purchase of Jacksonville’s courier work, Rozzell listed specifics. The difference in charges to the customer was “the primary negative aspect,” although he also listed other cost factors. In the negative points he enumerated with his March 9 memo, Rozzell wrote, at item six (G.C. Exh. 29):

One of the biggest problems that I see is that M-Tech is currently seeking new business for their processing center and they (M-Tech) are going to banks that Security Couriers currently serve. When their representative talks with a prospective bank, they inform the bank that courier service is done at a cheaper cost than Security Couriers or any other courier company since they (M-Tech) are not regulated by the Railroad Commission and do not have to charge rates as established by that commission. We have lost an account in Quitman, Texas, this week to M-Tech based on this information.

Faced with such competition by a corporate sibling, SCI’s Coben obtained a March 14, 1988 opinion letter (G.C. Exh. 25b) from Austin Attorney Paul D. Angenend that MTech’s

courier service did not fall within any of the exceptions listed in the Texas Motor Carrier Act. Coben testified that although profit was important, his main concern with Jacksonville’s courier operation was not economics, but legality (6:750, 805, 826). He wanted to get it operating legally or he did not want SCI to be part of the Company (6:751, 821, 826). According to Coben he wanted to use the Angenend letter to persuade the organization to operate within the law (6:750).

Coben did immediately send a copy of Angenend’s letter to Tim Connor, Gibbons’ boss, and Gibbons forwarded a copy to Balch (G.C. Exh. 25a) and to attorney Deckalman in March (G.C. Exh. 24; 5:602–603, 635). There was no change. Despite Coben’s felt need to persuade officials to purify Jacksonville’s courier operation, Coben, Sims testified, did not discuss the Angenend letter with Sims until about July (5:666–667) or early summer (5:706). Confirming that he did discuss the letter with Sims (6:788, 791), Coben asserts that he is unable to place the time other than it was between EDS’s April 19 initial acquisition and his August 3 memo to Sims (6:818). When Sims visited Coben in April and introduced himself, they discussed Coben’s role with EDS and his contract (6:843). Coben assumes or guesses that it was about 2 months after April 19, or about June 19, that he discussed the Angenend letter with Sims (6:794). Sims’ response, Coben testified, was that he wanted it done “legal.” (6:793, 830) Sims does not recall the legal specifics being discussed, and he assumed at the time, based on Coben’s assurance, that the conversion to SCI would cure the legal problem (5:714–715).

Although Coben initially testified (6:794) that his discussion with Sims of the Angenend letter occurred “way before” his August 3 memo (G.C. Exh. 26) to Sims (informing Sims of Harenchar’s assignment to convert Jacksonville to SCI’s “format” by September 3), it is clear from Coben’s later testimony that it was the Angenend letter discussion that sparked, in that same conversation, Sims’ directive to Coben to submit an action plan. Coben testified that he complied by submitting his August 3, 1988 memo (6:809–810). Thus, I find that any discussion between Coben and Sims of the Angenend letter would have been in July 1988. (Later I find that they never discussed it before the union activities materialized.)

Although some of MTech’s past concerns had been about maintaining the levels of both price and service for its customers if SCI took over its Jacksonville courier service, Jacksonville’s Balch also had expressed concern over whether SCI would hire Jacksonville’s drivers (5:628, Gibbons). At Gibbons’ request, Balch expressed these concerns in a December 7, 1987 memo (G.C. Exh. 16a) to Gibbons which Gibbons forwarded to SCI’s Tyler Berkley the next day (3:480–481; 5:623). Rozzell reported in his February 26 memo to Coben that he had informed Balch that he did not know if any drivers would be hired, and any hired would have to go through SCI’s complete new-hire screening process (G.C. Exh. 28).

In addition to his other concerns, Balch was worried about his own compensation, for his bonus compensation, and in part that of Gibbons, was directly related to the profit performance of the Jacksonville operation (3:482; 4:515; 5:628; 7:1136). Harenchar described the bonus as “significant” (7:986). For the various reasons indicated, and from the be-

gining of consolidation talks as early as 1987, Balch had been opposed to MTEch's contracting the Jacksonville courier work to SCI (3:476; 5:635; 7:1134-1135). Balch testified that he ended his resistance in mid-1988 because he finally realized he no longer owned the Jacksonville operation and because it made no sense from the corporate perspective to have couriers from separate units driving over the same roads (7:1137).

b. Ben Sims bites the bullet

Earlier I reported that at the Las Colinas meeting of September 22, 1988, Ben Sims had to resolve the \$20,000 objection expressed by the Jacksonville group. At the September 15, 1988 meeting Harenchar reported that Sims earlier had assigned to Coben, who had assigned to Harenchar, the task of transferring Jacksonville's courier operation to SCI, and that Harenchar's initial target date of September 3 had slipped because of the press of other matters (5:639-640; 7:982). Having worked with Sims before, Harenchar never doubted that Sims would resolve the \$20,000 question against Jacksonville because Sims would see the \$20,000 as the corporation's money with the net effect being zero at the corporate level (7:982-984, 1006).

Testimony abounds by Sims and Harenchar concerning how, from the corporate viewpoint, the net effect of the \$20,000 a month was zero. Harenchar describes it as transferring \$20,000 from one pocket to another (7:988, 1022). Sims confirms the view that, at his level, "It's all my money." That is, it is corporate money rather than the money of a subsidiary or operational unit (5:709). According to Sims, he doubts that anyone [outside of Jacksonville, apparently] could have "mustered the courage" to approach him with such a \$20,000 a month profit and loss question of an operating unit (\$240,000 a year) in light of the \$350 million purchase price EDS had paid for MTEch (5:682, 700, 705). That concern would have been too "provincial" (5:682, 697). The overall leveraging, even as to SCI, was so valuable to EDS as to transcend, Sims testified, any question of a mere \$240,000 a year (5:699, 705-706). Yet, earlier Sims testified that in EDS's decision to acquire MTEch, SCI was not a critical or strategic part of the acquisition decision because the book value of SCI's business represented an "infinitesimal" part of MTEch's \$270 million book value (5:658-659).

Evidence is limited respecting the discussion at the September 22 meeting. At one point in his testimony Harenchar claimed the attorney-client privilege (7:1000). However, he testified that a management decision was made to proceed with the transfer (of Jacksonville's courier function), and that the transfer date would be October 10, 1988, a Monday (7:1003-1004). That date was the Columbus Day holiday. Earlier Harenchar testified that, responding at the meeting to the \$20,000 issue, Sims exclaimed (7:995): "Hey, it's all my money. The issue is getting this operation legal."

Sims testified that the decision to fold the courier functions into SCI was not a major issue (5:670), that it was a very small decision (5:683), and, from the start, a "no brainer" issue with an obvious answer (5:695-696). The \$20,000 a month item was immaterial in the September 22 decision to proceed because it was all corporate money. Sims also testified that he believes in operating a business in the center of the (legal) square (5:668), and that the decision to

proceed so as to convert Jacksonville to a legal courier operation would have been made irrespective of the \$20,000 a month extra cost (5:706-707). According to Sims, the decision to transfer was neither generated by the union activity at Jacksonville (5:694), nor was the implementation accelerated by notice of that activity (5:687, 716).

Recall that the Angenend letter of March 14, 1988 (G.C. Exh. 25b) said, in effect, that MTEch was operating in violation of the Texas Motor Carrier Act. Thus, to transport the bank items over Texas highways lawfully, MTEch had to be either (1) a certificated common carrier and charge the tariff rates or (2) a partial owner of the items. MTEch was neither. Additionally, Coben testified that the exception for contract carriers would be of no value because a contract must be authorized by the TRC and even then the contract carrier can service only five customers per contract (6:815-816). (It seems obvious that the TRC would not permit a contract carrier to multiply his contracts so as to compete with the common carriers serving the area.)

According to Coben (who concedes, 6:822, that he is not a lawyer), EDS can pass SCI's transportation charge on to its customers, if they are agreeable, because the transportation will have been done by a certificated carrier, SCI, and even though EDS owns SCI (6:820, 822-823). Presumably any attempt to pass on the charges would await the time of contract renewals; indeed, Harenchar testified to that effect (6:985). Whether Coben's description of Texas law correctly states that law is not tested, or supported, in the record by any competitor, expert, or adversary. Attorney Angenend, for example, did not testify, and the parties do not brief the Texas law in their posthearing submissions.

c. Preliminary discussion

Notwithstanding Sims' professed corporate balance sheet view of EDS's finances, the fact remains, as Harenchar concedes, that in the short term someone has to "eat" that \$20,000 a month (7:986). In the long term, when the customer contracts come up for renewal, the extra \$20,000 cost, Harenchar testified, probably will be passed on to EDS's customers (7:985).

In the meantime Jacksonville's balance sheet will be reduced by about \$240,000 a year. In the professed view of Sims and Harenchar, the net effect at the corporate level is zero because Jacksonville's loss will be offset by Tyler's gain. The impact on Balch and Gibbons, however, is both adverse and substantial. Balch and Gibbons, it seems, must personally subsidize at least part of the \$240,000 by virtue of their reduced bonuses. There is no record evidence that EDS plans to calculate their bonuses without regard to the \$240,000 reduction until such time as the customers' contracts are renewed and SCI's tariff charges passed on. If EDS did that then, of course, the net effect on EDS would not be zero after all.

More factors remain to be considered under this topic, but for now I defer further discussion in order to proceed with summarizing other events.

9. Tyler assumes Jacksonville's courier work

a. Conversion plans

Recall that after the Labor Day target went by, and even before September 22, Harenchar and Coben had decided that

the next logical time to make the transfer would be the holiday (Columbus Day) weekend of October 8–10, 1988 (7:997). To Harenchar, therefore, Sims' decision to proceed meant to do it on the next holiday, October 10 (7:1004).

Harenchar testified that after the September 22 Las Colinas meeting (when Sims decided to proceed) he instructed Albritton to proceed with the plans to produce consolidated route sheets (7:1024). Around October 1, Harenchar testified, he reached the point of confidence, based on Albritton's progress, that they could handle the transfer effectively (7:1073).

During this same time frame events were proceeding in the representation case, Case 16–RC–9078. The parties stipulated that the September 29 notice of hearing set a hearing date of October 5 in Tyler. An order issued the next day by NLRB Region 16 rescheduled the hearing to (Wednesday) October 12, 1988, at 10 a.m. (7:1026–1028). Harenchar testified that when the hearing date was moved to October 12 it created some uncertainty as to whether SCI would proceed with the consolidation that weekend (7:1028).

Albritton earlier had purchased reservations, some non-refundable, for a preset 1-week vacation. He and Harenchar discussed the situation, and Harenchar permitted Albritton to leave with the understanding Harenchar might have to summon him from vacation (7:1025, 1028–1029). Albritton departed on Wednesday afternoon, October 5. The very next day, a decision having been made to proceed as planned, Harenchar called Albritton who arrived back on Friday, October 7 (6:876, 881–883; 7:1029).

b. Transfer implemented and Jacksonville drivers terminated

That Friday, October 7, Albritton called the team he earlier had selected. That team, four in all, assembled in Dallas and worked on Saturday and Sunday coordinating the routes and maps. The team consisted of Albritton, Joseph A. Gipson, William L. Nelson, and Leaver Jo Bailey (6:876–877, 884). Assisting the team was Fred Schmidt who had been working in preparing route sheets (9:1309–1311).

In the meantime Harenchar had contacted the northern and southern (Texas, apparently) regional managers of SCI to obtain the drivers needed (7:1029–1030). About 20 drivers were called in from Dallas, Houston, San Antonio, and Austin for this special assignment, and they arrived in Tyler Sunday night and Monday (6:877, Albritton; 9:1312, Gipson). Apparently that Monday, the holiday of October 10, Albritton, Gipson, Nelson, and Bailey reviewed the routes and maps with the special assignment drivers. Nelson, who at the time was SCI's Tyler manager, testified that of the 160 to 170 banks covered the first day (Tuesday, October 11), the special assignment drivers missed only one deadline. Nelson describes these drivers as SCI's best from the other cities (7:1110–1111). Albritton testified that a few of the keys were mixed up but that these problems were corrected (6:924).

On Friday, October 7, the Jacksonville employees were told they were to attend a mandatory meeting the following Tuesday, October 11. When they arrived at work on October 11 they discovered that new locks had been installed on the premises and that their old keys to the door would not fit (1:32, 48, 112; 2:187, 263, 333, 372–373, 400).

Eventually the Jacksonville drivers were admitted and ushered into a conference room where Allan Balch introduced

James Gibbons. Saying he would get right to the point, Gibbons stated that he and Balch had been looking at the courier operation and had concluded that the proper business decision was to close Jacksonville's courier operation, and that everyone was separated "as of now." Gibbons further stated that everyone would receive severance pay through the end of the week, and he told them they would receive more details in exit interviews that day.

The foregoing description of Gibbons' statement is generally a composite of the testimony of the six drivers⁴ who testified plus the testimony of Gibbons (4:531, 552–553; 5:642, 645, 717) and Balch (7:1153–1154). Gibbons also testified that he does not believe he said anything about the possibility of a motor carrier violation being a reason for the termination and transfer (5:575).

In the General Counsel's posthearing brief at 10, the Government's attorneys assert that Gibbons said the decision to close the Jacksonville courier department had been made for "economic reasons." Counsel cite driver Lance (2:188–190) as the record support. Lance gave no such testimony. The closest Gibbons came to a reason appears in his own testimony where he describes that he informed the assembled employees the closing was "the proper business decision for us to make." (4:552.)

When the General Counsel asked Gibbons if he told them when the decision had been made and what he had relied on in making it Gibbons replied, "I don't believe I did." (4:552–553.) Similarly, Gibbons testified that at the October 12 representation hearing he was asked the reason EDS had decided to shut down the Jacksonville courier operation. Asked if he then responded that a possible violation of the Texas Motor Carrier Act (TMCA) was a factor, Gibbons testified, "I don't recall answering that way." (5:574–575.) Responding later to questions by the Respondent, Gibbons testified that on October 11 he had not named Ben Sims or Martin Coben nor offered any details of the corporate interest in leveraging business units and such because he did not think that information would mean much to the drivers (5:646, 717).

The General Counsel also asserts (Br. 10), relying again on the same reference to Lance, that Gibbons told the drivers that the Jacksonville courier work was being transferred to SCI in Tyler. Citing Gibbons (5:717), the Respondent asserts Gibbons said that he and Balch had decided to "contract" with SCI (Br. 20). None of the witnesses so testified. However, drivers Nock (1:113) and Barnes (2:334) testified that one or more persons present were introduced as being representatives from SCI, and driver Samples testified that the man who spoke (Gibbons) said he, Balch, and a man from SCI had made the decision (2:374). Driver Chumbley testified that she does not remember whether the employees were told that beginning that day SCI would run the courier routes (1:59).

At one point (5:582) Gibbons does assert that Jacksonville's data processing employees were told, the day of the transfer, that the courier work had been transferred to SCI. Respondent cites this passage as support for its statement that on October 11 "EDS formally advised the Jacksonville

⁴Queen E. Chumbley (1:32, 48), Shawn D. Nock (113–114); Martha J. Lance (2:189), Walter Paul Stanwood Jr. (2:264); Bonnie G. Barnes (2:334), and Charles B. Samples (2:373–374).

courier department of its decision to contract with Security Couriers.” (Br. 23.) Gibbons explains that he was not present and that Balch coordinated such meetings with the employees (5:582–583). Driver Charles Samples testified that as the drivers left the termination meeting they observed SCI vehicles with three to five people in them on the premises. According to Samples, the EDS drivers had not been told about the purpose of the SCI vehicles and people until Chandler, at that point, told them SCI was going to cover the Jacksonville routes (2:377).

In addition to the fact that SCI representatives were present with Balch and Gibbons at the termination announcement, one purpose of the exit interviews by EDS was to inform the terminated drivers that they could file applications at that moment for employment with SCI. Indeed, an SCI representative was present at the exit interviews with at least Bonnie Barnes (2:334–335) and Charles Samples (2:375). Based on these facts, and in light of the agreement in the briefs of the parties, I infer that on October 11 Gibbons additionally did tell the Jacksonville drivers that their former work was being transferred (or contracted) to SCI.

I shall not dwell on whether Gibbons said “transferred” (the General Counsel’s term) or “contracted” (Respondent’s term). A variety of words, including “consolidation” and “conversion,” was used by the witnesses throughout the trial in describing what happened. I should note, moreover, that no copy of any purported contract between EDS and SCI, covering the Jacksonville courier work, was identified or offered in evidence, although Gibbons testified that such was entered into (4:550–551). On October 7, 1988 “MTech Corp.” and Security Courier Corporation (SCC) entered into a 1-year agreement, effective October 11, for 19 identified vehicles (18 being Ford Escorts) to be leased from MTech to SCC for the total sum of \$10 (G.C. Exh. 22; 4:555–559; 5:591–592, Gibbons). Driver Charles B. Samples, who was hired by SCI, testified that Jacksonville’s cars went to SCI (2:377–378, 384). Al Albritton also confirms, explaining that SCI-Tyler has “retired” some of them because they were not in good shape when SCI received them from Jacksonville (6:943).

Gibbons testified that for two reasons Respondent decided to withhold notifying drivers, at Jacksonville or Tyler, or customers until Tuesday, October 11. First, Respondent did not know how the Jacksonville drivers would react and advance knowledge could affect their performance adversely. Second, EDS wanted its designated representatives to be the ones notifying its Jacksonville customers (5:584, 642–644, 723–726). Gibbons denies that Respondent followed this procedure because it wanted to prevent its Jacksonville drivers from telling its customers they really had been terminated because of their union activities (5:723).

c. *SCI hires some of Jacksonville’s drivers*

As I will cover in more detail later, the complaint, in addition to alleging that EDS unlawfully terminated its Jacksonville drivers on October 11, also alleges that SCI constructively refused to employ 14-named drivers on and after October 11. EDS admits the termination but denies the unlawfulness. Denying the constructive refusal allegation, SCI admits it required the terminated drivers to file applications as new employees in order to be considered for employment by SCI.

SCI hired some of the EDS Jacksonville drivers, and not all the terminated drivers applied.

As reflected in the evidence, SCI’s hiring standards for drivers are strict. Coben testified that SCI did not want to hire any drivers who did not meet its employment standards (6:837). Notwithstanding SCI’s status as a wholly-owned subsidiary of EDS, and the fact SCI had to obtain drivers for most of Jacksonville’s routes (a few routes were merged with Tyler routes), the necessary Jacksonville drivers, Harenchar testified, were not simply transferred from the EDS-Jacksonville payroll to the SCI-Tyler payroll for two asserted reasons. First, EDS does not so transfer hourly paid employees (7:1031–1032), and the Jacksonville drivers were hourly employees paid semimonthly (7:959, 1033, 1061). Second, even if EDS had such a transfer policy, Coben testified, SCI probably would have ignored it because of SCI’s strictly enforced hiring standards (6:836–837).

Notwithstanding SCI’s strictly enforced hiring standards, Coben did not require Harenchar to undergo SCI’s rigorous hiring procedures because, according to Coben, Harenchar was hired as an executive and not as a driver (6:842–843). Indeed, Harenchar did not even have to complete a probationary period nor fill out an SCI application form because Coben was hiring someone to report directly to Coben and it was the “chemistry” and skills that were important. Those distinctions, coupled with Coben’s awareness that Harenchar had worked at EDS for several years, explain the different treatment Coben, in effect, testified (6:833, 839, 842, 848).

SCI had about 15 routes in Tyler (7:1007, 1079) with 15 drivers plus Branch Manager William L. Nelson (7:1079). EDS-Jacksonville had about 22 or 23 routes (2:365; 6:900; 7:1008) with about 23–24 drivers (2:295; 7:1125; 8:1238). In the conversion process on October 10, SCI combined about four or five of the routes (7:1007–1008, Harenchar). During 1988 up to October 11, Balch testified, the Jacksonville facility employed a total of about 80 persons, including managers, drivers, and everyone (8:1238–1239).

B. *The Supervisor Issue*

1. Introduction

EDS-Jacksonville employed three dispatchers: Darlene Alexander, Ken Dennis, and Mort Oliver (8:1239; 10:1341–1342). The General Counsel alleges, and Respondent denies, that they are statutory supervisors and agents. Oliver was added to the complaint’s listing of alleged supervisors at the beginning of the hearing (1:27–28).

The General Counsel (Br. 15) relies on cases such as *Pacemaker Driver Service*, 269 NLRB 971, 975–976 (1984), enfd. on supervisor point sub nom. *Carrier Corp. v. NLRB*, 768 F.2d 778 (6th Cir. 1985). Contending that the dispatchers’ duties and authority are analogous to those of non-supervisory lead persons, the Respondent (Br. 44–50) relies on cases such as *NLRB v. Health Care Logistics*, 784 F.2d 232 (6th Cir. 1986), enfg. 273 NLRB 822, 824–825 (1984), and *Gem Urethane Corp.*, 284 NLRB 1349 (1987). Regardless of whether they are supervisors within the meaning of the Act, counters the General Counsel (citing cases), they are statutory agents of the Respondent.

Before describing Jacksonville’s managerial structure, I need to outline the nature of Jacksonville’s business. Allan Balch testified that the Jacksonville facility performs data

processing for banks in the northeast Texas area. Because the work is done at the Jacksonville facility, Jacksonville employs couriers to pick up the checks, deposits, and other items, bring the work to the Jacksonville facility for the data processing, and return those items to the banks. During the business day the banks have the items. At the close of business the banks release the items to the couriers between about 4:30 p.m. to about 8 p.m. Jacksonville processes the work overnight, and the following morning the couriers return the items to the banks before they open for business. This portion of the data processing work is called batch processing. During the day Jacksonville will have on-line communications with the banks, but such on-line communications have no connection with the courier operation. The courier function is the mechanism by which Jacksonville delivers its batch processing service to its customers (7:127-1130; 8:1194).

The couriers worked a split shift. Their workday traditionally began at 5 a.m., although they were permitted to clock in 15 minutes early. (I discuss later an allegation that EDS unlawfully eliminated the daily 15 minutes of overtime.) After delivering their morning routes, the couriers would return to the Jacksonville center, service their cars, punch out, and be on break until their afternoon pickup routes (1:21-22, Chumbley; 1:94-95, Nock; 2:321, Barnes). Driver Queen E. Chumbley reports that it would take 3 to 6 hours to complete a route (1:22), and driver Charles B. Samples describes the average time as 4 to 5 hours with about eight banks on the average route (2:365-366).

It is unclear from the record just when the three-named dispatchers (Alexander, Dennis, and Oliver) were on duty as dispatchers and whether they worked the same split shifts as the couriers. According to Balch, Chandler rotated the duties of dispatcher (7:1133; 8:1198-1199). Presumably that means that only one person at a time served as dispatcher.

2. Jacksonville's managerial structure

The complete management structure of the Jacksonville facility is not described in the record. However, it is described as it relates to the courier operation. As I have noted earlier, Allan Balch served at the top of the 80-person work force as the facility manager. Reporting to Balch during 1988 as operations manager was Tommy Treadwell (7:1131-1132, Balch). Balch testified that Treadwell's jurisdiction included everything but customer service, sales, and marketing (8:1237). Consistent with Treadwell's general jurisdiction over the courier department (managed by Don Woods, as earlier noted), one of the persons reporting to Treadwell was Don Woods (7:1132). The three-shift supervisors from the data processing center (one supervisor for each of three shifts) also reported to Treadwell (10:1336). Balch estimates that Treadwell had 65 to 70 individuals, out of the 80 total, under his general jurisdiction (8:1238).

Don Woods originally was MTEch's Tyler facility manager when MTEch had a facility there. Treadwell, who confesses to a poor memory, recalls that MTEch merged its Tyler facility into its Jacksonville operation in July 1986 (10:1388). Gibbons recalls the transfer of the Tyler group, which he numbers at 10 to 11 (with 2 or 3 not transferring), as occurring in about August 1987 (3:435; 5:606-609). Balch said "1976," but no doubt meant 1986 (7:1147). In any event, Balch testified that during the period of July 1 through

October 11, 1988, Woods's duties included responsibility for the couriers, with Robert Chandler, as courier supervisor, reporting to Woods and Woods reporting to Treadwell (7:1132-1133).

Balch concedes that he did not involve himself in the daily functioning of the courier operation, and that he left the courier operation to Treadwell who in turn trusted Woods and Chandler to get the job done (8:1237). Nevertheless, Balch undertakes a rather detailed description of the courier operation, the limited authority of Robert Chandler, and the absence of authority by the dispatchers (7:1133-1134; 8:1195-1218). Although Treadwell also reports Chandler's authority as rather limited, and the dispatchers as having no authority beyond calling a prearranged dispatch list and reporting problems (10:1341-1359), he describes Woods's connection to the courier function as not beginning until August 1988 and thereafter as being involved "hardly at all." (10:1387-1389.)

Treadwell asserts that it was he who had daily contact with Chandler and solved any problems (10:1340). Treadwell agrees with Balch that Chandler prepared the work schedules for the couriers, and that the duties and authority of the dispatchers consisted of seeing that the vehicles were ready, that the couriers were present, and that the drivers left on time. But Treadwell asserts that the dispatchers had no authority to enforce any of these steps other than reporting any problems to Courier Supervisor Chandler (8:1198, 1202; 10:1338, 1342). Dispatchers and drivers both were hourly paid, and dispatchers received no extra pay for dispatching because they were drivers themselves (10:1344, Treadwell). Drivers and dispatchers wore identical uniforms (8:1206-1207, Balch; 10:1355-1356, Treadwell), and they were covered by the same benefit plans (10:1356, 1380). According to Balch (8:1206) and Treadwell (10:1358), the dispatchers did not attend Treadwell's meetings with his supervisors as did Chandler. If Chandler met with the dispatchers separately from the couriers, Balch does not know about it (8:1206). Chandler did not testify, nor did any of the dispatchers.

Although the evidence is sketchy respecting when the dispatchers worked, and unclear as to whether more than one was on duty at the same time, Balch testified that Chandler would select a person (dispatcher) to come in early to see that the couriers are there and the vehicles ready (7:1134). Treadwell testified that management tried to equalize the hours worked, and that Chandler would prepare the driver schedule, and list of substitutes, on that basis. Thus, Chandler would place the driver with the least number of hours at the top of the list (10:1343-1344). According to Balch, Chandler rotated the dispatching duties among the senior drivers (7:1133; 8:1198-1199). Balch (8:1199-1202, 1216) and Treadwell (10:1342-1345, 1347) essentially agree that if a driver called in sick the dispatcher simply went to the list Chandler had prepared and, starting at the top, went down the list until he found a driver ready and willing to come in. If none was found, the dispatcher would drive. The dispatcher had no authority to order anyone on the list to report to work. The dispatcher would have to report any problems to Chandler. If Chandler was not available then the dispatcher would contact Woods, according to Balch (8:1203, 1216), or Treadwell according to Treadwell (10:1355). Neither Woods nor Chandler testified although both were hired by SCI and presumably available.

Treadwell testified that Chandler spent 100 percent of his time on the courier function and that he, Treadwell, devoted some 25 percent of his time to courier matters (10:1383–1384). As earlier mentioned, Treadwell testified that Woods spent practically no time with the courier function. This is so as to Woods, Treadwell testified, because Woods was occupied with plans to expand the building at Jacksonville (10:1389). The building expansion is a separate topic which I shall discuss later. Notwithstanding Treadwell's testimony that Woods had almost no involvement with the courier function, Treadwell thinks that Woods did inform Gibbons about the union activity among the couriers (10:1362), and that testimony confirms what Gibbons said occurred about September 14 (3:449–450). Consistent with Balch, Gibbons describes Woods as the manager of the courier operation (3:449). Moreover, it was Woods—and not Treadwell—who, Gibbons testified, reported to him about the union activity among the couriers when (or immediately after) Woods attended the September 15 Las Colinas meeting with Harenchar and the others concerning the consolidation of the courier operation (3:451; 4:500). Treadwell testified with an unfavorable demeanor and I generally do not believe him.

3. The evidence regarding Jacksonville

a. Introduction

Alleging and arguing that the Jacksonville dispatchers (particularly Darlene Alexander and Ken Dennis) are statutory supervisors, the General Counsel points to several items (Br. 13–16). These include (1) participation in modifying the courier schedule and (2) the fact that on one occasion Ken Dennis added the correct time to the time card of Martha Lance when she forgot to clock in (2:194–196). Such evidence is consistent with the status of either a supervisor or a nonsupervisory leadperson, but it does not establish either.

The drivers testified, for example, that the courier schedules were prepared by Chandler, Alexander, and Dennis, that they were subject to change, and that whoever was dispatcher could and did modify the schedules if someone called in sick (1:23, 80, Chumbley; 2:176–177, Lance; 2:245, Stanwood; 2:321–323, Barnes; 2:366–367, Samples). Their testimony is consistent with that of Balch and Treadwell that the dispatchers simply followed a predetermined procedure and driver list. None of that involves the use of independent judgment. Thus, there is no evidence that the dispatchers did not have a list of drivers prepared by Chandler and that the dispatchers, using their own knowledge of the routes and the drivers, selected substitutes by matching drivers to routes based on the dispatcher's judgment as to which driver was better qualified. I find that the driver schedule factor, and the timecard correction, do not add weight to the supervisor side of the scales.

Among the Government's points are two factors of significance. One consists of statements attributed to Treadwell and to Chandler concerning the authority of the dispatchers, and the second consists of disciplinary events.

b. Statements by Treadwell and Chandler

Driver Queen E. Chumbley testified that during the early summer of 1988 Chandler held a meeting with the couriers in his supervisor's area of the courier department. Chandler told them that whoever is dispatching has the right to “write

you up.” (1:46, 90) Courier Martha J. Lance testified that, after EDS assumed control, Chandler told her anytime he was absent Ken Dennis would be the supervisor and that the drivers were to obey his orders (2:182). Courier Bonnie G. Barnes testified that when she was hired 3 years earlier Chandler told her the dispatchers had the same authority as he did to pull timecards, make schedule changes, and to do whatever needed to be done (2:321–322). After EDS took over, Barnes testified, no one from management said the authority of the dispatchers had been changed (2:325).

Driver Shawn D. Nock testified that at one of the courier meetings in about March 1988, when the facility was still MTEch, Operations Manager Treadwell told the couriers that the dispatchers had the same authority as Chandler and could discipline the drivers. Treadwell told them they were to do what the dispatchers directed whether it was right or wrong and that later “it” (error by the dispatchers, presumably) “would be taken care of.” (1:96–97) Courier Charles B. Samples testified that about mid-1988 Treadwell told the drivers they were to do as the dispatchers directed even if the instructions were wrong (2:366).

For his part, Treadwell denies telling the drivers that the dispatchers had the same authority as Chandler, asserts the dispatchers in fact did not have that authority, denies telling the couriers that they were to obey instructions of the dispatchers even if the instructions were wrong, and denies telling the couriers that the dispatchers were supervisors (10:1358–1359). In a Freudian slip moments later, when explaining that he told Chandler to remain neutral respecting the union matter, Treadwell exclaimed that he did not discuss neutrality with the dispatchers because they were not management, they were “supervisors.” (10:1362.)

Couriers Chumbley, Lance, and Barnes each testified with a persuasive demeanor and I credit them. Moreover, their testimony stands uncontradicted by Chandler who did not testify. Conceding the obvious, Balch admits that he has no personal knowledge of what Chandler had to say to the drivers respecting the dispatchers' authority (8:1238). Apparently suggesting that he either was omnipresent or omniscient, Treadwell proclaims that no “manager” (presumably including Chandler) at Jacksonville advised couriers that the dispatchers had the same authority as Chandler (10:1358–1359). Elsewhere Treadwell concedes he did not keep abreast of the daily modifications Chandler made in the courier schedule (10:1347–1348), and that if the dispatchers exercised any discretionary authority, which they did not have, he did not know about it (10:1355). He also admitted that he was not privy to every conversation Chandler had with the dispatchers and he therefore does not know exactly what Chandler told them regarding the performance of their duties (10:1382–1383).

Testifying with persuasive demeanor, drivers Nock and Samples disclosed that in about March 1988, and reinforcing his admonition about 3 to 4 months later, Treadwell himself declared to the couriers that the dispatchers had the same authority as Courier Supervisor Chandler. Emphasizing the extent of the couriers' obligation to obey the dispatchers, Treadwell exclaimed that the couriers were to do as the dispatchers told them—even if the instructions were wrong! Treadwell voiced his ritualistic denial with an unfavorable countenance, an unpersuasive demeanor, and I do not believe

him. Believing Nock and Samples, I find that Treadwell declared to the couriers just as Nock and Samples described.

c. Disciplinary system and events

(1) Introduction

Operations Manager Treadwell testified that MTEch-Jacksonville maintained personnel files for its employees. Among the documents that would be placed in the files would be employee evaluations. Such documents would remain in an employee's personnel file until the employee terminated. At an employee's termination, documents in the personnel file were removed and the file closed. The documents removed apparently were not destroyed, but Treadwell does not describe where they were stored. When EDS took over at Jacksonville, Treadwell testified, changes were implemented concerning what went into personnel files and what documents were maintained outside the personnel files. Treadwell does not specify whether the changes were implemented around July 1, 1988, or later (10:1375-1378, 1385-1386). The record contains no copies of any of these formal disciplinary forms.

Some of the drivers described the formal disciplinary warning forms which they were required to sign when receiving notice of their warnings. Courier Chumbley describes the document as a white paper which dispatcher Ken Dennis had her sign in the summer of 1988, when the facility was still MTEch, for failing to report to work one morning. No penalty was assessed, other than the loss of her hourly pay, and she does not know what MTEch did with the form (1:39, 83-87). Treadwell does not know where the personnel files of Chumbley and the other separated drivers are, although he asserts that Balch's administrative assistant, Donna Speck Sosby,⁵ would know. Neither does he know what has happened to the formal appraisal forms that were used (by MTEch, apparently) for disciplinary action (10:1378, 1382). Furthermore, Treadwell asserts that he has no personal knowledge of which drivers received formal discipline after EDS took over (10:1386).

The Government requests (Br. 26) that an adverse inference be drawn against Respondent because the personnel documents "were not produced." The evidence is insufficient to show nonproduction. Thus, the General Counsel did not offer in evidence a copy of a subpoena duces tecum that had been served on the Respondent but not complied with. By merely asking Treadwell about the documents, and obtaining his protestations of ignorance, the Government does not establish nonproduction.

Courier Shawn D. Nock testified that "write ups" came in different colored slips for a person's first, second, and third offenses (1:101). Presumably the different colored slips were part of the formal disciplinary system which Treadwell referred to. Like Chumbley, driver Stanwood describes the formal slips as white (2:259, 282), although that may have been the color of the first of the colored-slip warnings. Certain warnings allegedly issued to couriers Larry Reagan and Walter Paul Stanwood are in issue and are discussed later.

At least as early as 1987, Courier Supervisor Chandler began recording in a brown loose leaf notebook (R. Exh. 12)

⁵Balch identified Donna Speck Sosby as his administrative assistant (7:1125; 8:1211).

work incidents, mistakes, and events pertaining to the couriers. The notebook, described by most of the witnesses as the "brown book," contained a page for each driver in alphabetical order (1:101, Nock; 2:184, Lance; 10:1368, Treadwell). Driver Nock testified that Chandler said the notebook's purpose was to "cover himself" by having something to look back to for information when a question arose (1:102). Treadwell testified that being "written up" in the book did not constitute disciplinary action against the employee (10:1366). Treadwell concedes, however, that Chandler would come to him whenever the notations indicated a pattern of conduct possibly warranting discipline, they would discuss it, and they would impose such discipline as they thought necessary (10:1366).

The General Counsel does not allege or contend that the "brown book" constituted discipline, but contends that its significance bears on the supervisor issue (2:214-216). That position apparently is based on testimony that the dispatchers could and did enter notations of driver mistakes in Chandler's brown book (1:102, Nock; 2:185, Lance; 2:259-260, Stanwood; 2:322, Barnes). Chandler kept the book in the unlocked middle drawer of his desk until about the last of September 1988 when its location was switched to the drawer of a locked filing cabinet (1:102, 186-187). I do not credit Treadwell's testimony that to his knowledge the book always remained accessible to everyone (10:1366), nor do I credit him when he testified that even the drivers could write in the book if they so desired (10:1374). Driver Lance found the manner in which the book was maintained to be intimidating because entries frequently were made openly and with some public comments (2:185, 208-209). The book did not bother driver Nock (1:159), and apparently many of the drivers joked about it (1:102; 2:286). Such joking apparently was in the nature of gallows humor, for to driver Stanwood the book was not a joke, but a threat (2:286).

On one occasion, in about late September or early October 1988, Stanwood persuaded Chandler that a notation that Larry Reagan left late on his route should be deleted because the notation was based on incorrect information (2:260-263, 285, 290). The record is unclear whether dispatcher Darlene Alexander entered the information or whether Chandler did based on what Alexander reported. Chandler personally scratched through the entry based on Stanwood's protestation to him on behalf of Reagan. Even if Alexander did not make the entry, it is clear Chandler accepted Alexander's word without investigation. Thus, when Stanwood asked Chandler why Reagan was written up Chandler replied, "Darlene said he didn't show up for his morning route." (2:262)

(2) Fred Kennedy and Nick Mueller discharged

In the Government's brief (at 14) the General Counsel asserts that dispatcher Ken Dennis participated in the terminations of Fred Kennedy and Nick Mueller. No complaint allegations pertain to Kennedy or Mueller. Their situations are relevant only respecting the supervisory status of the dispatchers.

The Kennedy incident is described first by courier Chumbley (1:39-41, 78-83). As reported by Chumbley, she was present in the summer of 1988 when Kennedy was fired on a Saturday morning. When Kennedy arrived Ken Dennis informed him he would have to take a different route from the one scheduled for him. As neither Chandler nor Dennis

testified, we do not know how the change came about. Chumbley asserts that Dennis made the change, but that does not show Dennis used independent judgment in doing so.

Kennedy became irate and abusive toward Dennis who told Kennedy either to run the route or punch out and go home. When Kennedy did not leave, Dennis telephoned Chandler. (This apparently was around the 5 a.m. starting time and it would appear that Chandler was at home rather than in the data processing portion of the facility.) When Chandler arrived he asked Kennedy what the problem was. Kennedy replied that Dennis had changed his route. Chandler told Kennedy that if he did not want to run the route to give Chandler his key (to the Ford Escort, presumably) and to punch out and go home. Kennedy gave Chandler the key, left, and never returned. Chumbley concluded that Kennedy had been fired.

Courier Lance's brief description essentially matches that of Chumbley except she reports that Dennis said he called Chandler and Treadwell (2:181). Driver Samples, who places the incident in about June 1988, heard Dennis talking over the telephone to Chandler and telling Chandler they needed to do something about Kennedy (2:367).

According to Treadwell, Chandler, unable to calm Kennedy, called Treadwell. On arriving at the scene, Treadwell discussed the circumstances with Dennis, Chandler, and others (drivers), and then asked Kennedy for the keys but Kennedy refused. At that Treadwell told Chandler to call the police. Either then or when the police arrived Kennedy surrendered the keys, Treadwell terminated him, and Kennedy left (10:1349-1351). The General Counsel did not call any rebuttal witnesses in the case.

The General Counsel's witnesses testified with a believable demeanor whereas Treadwell did not. Chumbley's credited version places Chandler at the center of the action with Kennedy. Lance says Treadwell was called, but no one reports Treadwell as arriving. Even under the General Counsel's evidence, it is possible that Kennedy was not formally terminated until Chandler conferred with Treadwell later that day.

Dennis told Kennedy to run the route or punch out and go home. This does not establish that such an order was the equivalent to discharge. The order is more in the nature of a situation-control suspension, with consequences to be determined later. The incident does reveal, however, that, in the absence of Chandler, dispatcher Dennis was in charge to the extent of being able to tell a driver to punch out and go home if he was not going to run a route. The dispatcher was not required to call Chandler first—contrary to the testimony of Balch (8:1208) and Treadwell (10:1346) that dispatchers had no authority to discipline or suspend drivers. Indeed, according to Balch (8:1203-1204) and Treadwell (10:1346), neither did Chandler. Balch and Treadwell differ over to whom Chandler made his disciplinary recommendations. Balch says it was to Woods (8:1204, 1208) and Treadwell claims it was to him (10:1346, 1349). Only when Kennedy refused to comply did Dennis call Chandler. The incident confirms, to some extent, the statements made by Treadwell and Chandler to the couriers that the dispatchers had the same authority as Chandler. It also contradicts Treadwell's assertions (10:1342-1343) that the dispatchers had no authority to see that the couriers left on time or to require a driver

to take a route, and that their only authority was to call another driver if one refused an assignment.

Courier Samples testified that on one occasion (date unspecified) dispatcher Dennis told him he had recommended that driver Nick Mueller be fired. Mueller was fired (2:367-368). Asserting that dispatchers had no authority to recommend termination, and that no dispatcher recommended that Mueller be terminated, Treadwell testified that it was Chandler who recommended Mueller's termination and that Treadwell, after an independent investigation, terminated Mueller for repeated attendance problems (10:1351-1352). Although I have found Treadwell not a credible witness, the Mueller incident amounts to nothing because Dennis apparently did not explain to Samples whether he had made his recommendation to Chandler, to Woods, or to Treadwell. Presumably it would have been to Chandler, and Chandler may have investigated and then reported to Treadwell. Moreover, although Respondent did not object to Samples' testimony, statements demonstrating authority must come from, or be attributable to, the principal (a statutory supervisor or agent), not from the person (Dennis) alleged to be a supervisor or agent. I assign no weight to the Mueller matter.

4. Leaver Jo Bailey

At the hearing the supervisor status of SCI-Tyler's Leaver Jo Bailey also was in issue. Initially not having Bailey's correct name, the General Counsel simply included her on SCI's list of supervisors and agents as "Lavera (last name unknown)." In its answer, Respondent denied the allegation for lack of information. When the hearing began, the General Counsel amended the complaint to spell her name Leva Jo Bailey. Expressing doubt as to the spelling of Bailey's given name (offering "Lever"), the Respondent denied the amended allegation (1:11-12). The Respondent did not elicit evidence on the issue of Bailey's supervisor status. Addressing on brief the 8(a)(1) statements allegedly made by Bailey, the Respondent appears to proceed on the basis that Bailey is a statutory supervisor.

William L. Nelson was SCI's branch manager at Tyler from July 1985 to February 1989 (6:952; 7:1078). Bailey has worked at Tyler for over 4 years, and describes her position as field supervisor, a position she has held for 2 years (9:1255-1256). Although Nelson had the final hiring authority for Tyler (7:1086), and did nearly all the interviews (except for October 1988), Bailey handled about 1 percent of the hiring interviews herself (about 7 percent in the second half of October), and was in charge of a variety of matters including handling absenteeism and vacation schedules. Describing Bailey as the Tyler "supervisor," Nelson testified that when he was out of the office Bailey "handled whatever might come up." (7:1090-1093.)

5. Conclusion—dispatchers and Leaver Jo Bailey are agents

The evidence fails to demonstrate that the dispatchers exercised independent judgment in directing the work of the couriers. Based on statements made by Treadwell and Chandler, however, it is clear that the dispatchers *possessed* the same authority as Chandler to direct the couriers in their work and to "write them up." Although such "write-up" authority apparently pertained to Chandler's notebook rather

than to the formal reprimand system, Treadwell concedes that he and Chandler would discuss negative patterns recorded in the notebook, which Chandler would bring to Treadwell's attention, and that they have issued discipline based on such patterns.

Operating on a split shift beginning at least by 5 a.m., and extending to about 8 p.m., the 23 or so couriers were present at times when Chandler was not. Chandler therefore used up to three dispatchers to assist him. The record is unclear whether the three dispatchers worked together, in sequence, rotating with one in the morning and one in the evening and driving at other times, or what.

I need not dwell on the question of the dispatchers' supervisor status. There is no allegation that a dispatcher was fired and should be reinstated because dispatchers were employees. The situation is the reverse, with the allegations being that the dispatchers are supervisors and uttered statements violative of Section 8(a)(1) of the Act. Consequently, it is sufficient for such allegations if the evidence shows EDS placed the dispatchers in a position of apparent authority so that the drivers reasonably could believe the dispatchers spoke for management. Finding that to be the case here, I find that, by clothing the three Jacksonville dispatchers with apparent authority, EDS constituted them as its agents and is thereby bound by statements they made in their dispatcher positions.

Respecting Tyler's Leaver Jo Bailey, the evidence contains no description of instances in which she exercised independent judgment, nor did Branch Manager Nelson testify that she had that authority. I therefore find the evidence fails to demonstrate that Bailey was a statutory supervisor at the relevant times. As with the Jacksonville dispatchers, however, I find that Field Supervisor Leaver Jo Bailey was a statutory agent at all relevant times.

C. Alleged Unlawful Statements

1. Introduction

Complaint paragraph 9 alleges that Respondent violated Section 8(a)(1) of the Act by certain statements made by EDS Courier Supervisor Robert Chandler, EDS dispatchers Darlene Alexander and Ken Dennis, and SCI Supervisor Leaver Jo Bailey. Respondent denies the allegations. As I have mentioned, Chandler, Alexander, and Dennis did not testify, but Bailey did. The statements at EDS-Jacksonville allegedly occurred about October 24 when SCI was interviewing certain Jacksonville drivers for possible employment. Because Bailey's alleged remarks are tied to events at Tyler, I postpone summarizing her alleged statements until I cover the Tyler events.

The General Counsel's complaint alleges that Respondent's unlawful conduct began in August 1988 when dispatcher Darlene Alexander "told employees they would lose their jobs and that the company would be closed down if the union activity continued." Complaint paragraph 9(a)(1). Supervisor Chandler, according to the complaint, began his unlawful conduct about September 10 when he "instructed an employee to obtain certain information at a union meeting and report said information to him the following day." Paragraph 9(b)(1).

Aside from contending the statements were never made, Respondent argues that if made, as per the testimony (sum-

marized below), they are not coercive under the law because Alexander's remarks are descriptions of her personal experiences (Br. 57) and Chandler's reflect a desire not to coerce the drivers, whom he identified with,⁶ but to protect them (from perceived management hostility, presumably) (Br. 59-61). As was Chandler, Dennis was sympathetic to the union organizing drive and his statement or statements reflect protective concern rather than unlawful coercion (Br. 61-63).

2. Darlene Alexander—August 1988 closure threat to Shawn D. Nock

Placing Darlene Alexander's remarks in context requires some background. At one time a dress manufacturer—Mr. Fine—had a plant in Jacksonville (2:359, Nock; 8:1233-1234, Balch). Courier Bonnie G. Barnes testified that she and Darlene Alexander had worked at Mr. Fine for about 5 years before the factory closed (2:359). Shawn Nock's mother also had worked with them at Mr. Fine (1:136; R. Exh. 1 at 4; 2:361). From sketchy details in the record, it appears that union organizing began at Mr. Fine, and higher wages apparently were mentioned in the campaign (1:134). The union is not identified by name in the record. The plant closed, apparently during the organizing campaign, and Mr. Fine opened a plant in Mexico where the Company could get labor and materials cheaper (1:134; 2:361).

Based on remarks the witnesses attribute to Darlene Alexander when the union organizing began at EDS-Jacksonville, it is clear that Alexander blamed the earlier union organizing at Mr. Fine for the closing of the Jacksonville plant of Mr. Fine. Certain EDS employees disagreed, although the distinction expressed may show little difference or may not be fully articulated.

I present the incidents chronologically, rather than all the allegations in series as they pertain to one alleged supervisor. Thus, incidents involving Darlene Alexander are interspersed with those of Courier Supervisor Robert Chandler. The General Counsel offered evidence of remarks in addition to those alleged.

Complaint paragraph 9(a)(1) alleges that in about August 1988 Alexander "told employees they would lose their jobs and that the company would be closed down if the union activity continued."

Courier Shawn D. Nock testified that in late August she, driver Walter Paul Stanwood Jr., and other drivers began discussing the matter of unionizing. These conversations, favoring the idea of unionizing, frequently occurred in the breakroom in the presence of dispatchers Alexander and Ken Dennis (1:109). Nock testified that Alexander was the only person who argued against bringing in a union. In these frequent conversations Alexander said that if the drivers kept talking union there would be no jobs, no courier department, no nothing (1:109-110). Nock testified without contradiction and I credit her.

As Alexander made these remarks in late August (possibly early September), the timing appears to have been before either Stanwood asked Chandler, about September 11, for per-

⁶Chandler wore a courier uniform and occasionally drove a route (8:1239, Balch). According to Treadwell, drivers, managers, and Chandler himself viewed Chandler as more of a driver than a manager, and Chandler leaned toward the views of drivers rather than of the managers (10:1339, 1372).

mission to use the bulletin board for posting notice of the first union meeting, or before Treadwell admittedly learned. Thus, Alexander's reaction, at this point, appears to have been an expression of her personal animus rather than a reflection of any hostility by management. Although a supervisor's or agent's threat is not permissible simply because it is personal opinion, the circumstances must be coercive for the statement to violate the Act. In light of the timing and the fact the employees freely raised the subject in the presence of Alexander in the breakroom, I find the evidence insufficient to show coercive circumstances. I therefore shall dismiss complaint paragraph 9(a)(1).

3. Courier Supervisor Robert Chandler

a. Preface

The General Counsel alleges that Courier Supervisor Robert Chandler's remarks on or about September 10, September 14, and on "a date in September" violated the Act. The first two dates appear in the complaint as issued, and the third was added at the hearing (9:1250-1251). The dates described in the evidence do not match the dates alleged for each incident, but the variations are slight. No prejudice is shown, and the matters were fully litigated without objection.

b. September 12, 1988 questions and remarks to Bonnie G. Barnes

Complaint paragraph 9(b)(2) alleges that about September 14 Supervisor Robert Chandler "threatened an employee with changed employment conditions because of the union and interrogated said employee regarding her intention to sign a union card."

Courier Bonnie G. Barnes testified that she signed a union card about (Wednesday) September 14 (2:326-327). That is the date reflected on her card (G.C. Exh. 12). About 2 to 4 days earlier as she and Supervisor Chandler sat in the breakroom, Barnes testified, Chandler asked her what she thought about the Union, whether she was going to sign a card, whether she was for the Union, and "several questions about it." Barnes "really didn't give him an answer one way or another, but I let him think I wasn't for the union." Chandler said there would be a lot of changes before the Union "ever gets in" at Jacksonville and that "they" would not accept the Union in Jacksonville (2:326). Barnes concedes Chandler never said he would try to get her fired if she signed a union card (2:355).

Chandler's interrogation of Barnes was sustained and accompanied by a statement of changes and nonacceptance of the Union. Clearly management was probing for details. By closely wording the nonacceptance and the changes, plus the sustained interrogation, Chandler created an atmosphere in which an employee reasonably could fear reprisals based on her answers and from EDS in the form of changed conditions because of the Company's nonacceptance of the union activities of the drivers. I find that EDS, by the September 12, 1988 interrogation and threat, violated Section 8(a)(1) of the Act, as alleged.

c. September 13, 1988 request to Shawn D. Nock

Complaint paragraph 9(b)(1) alleges that about September 10 (a Saturday) Chandler "instructed an employee to obtain

certain information at a union meeting and report said information to him the following day."

Courier Shawn D. Nock testified that everyone had frequent conversations with Supervisor Robert Chandler, and that the topics included the Union. Chandler made no threats, Nock testified. Indeed, he said he thought "it" (unionization) might be a good thing and good for everyone (1:130-131).

Nock further testified that before (date unspecified) the first union meeting (September 13, as I summarized earlier) Chandler asked her to get answers from the Union to some questions and to return the answers to him the next morning.⁷ The questions were (1:110-111, 131-132, 147-149; R. Exh. 1):

1. Is it a Teamsters union?
2. Under the Union, would the routes be operated by driver seniority?
3. Would union dues be paid by individuals direct or by payroll deduction?
4. Would there be ICC physicals?
5. Would the routes continue to be driven on a split shift or would there be no split?

Nock's list (R. Exh. 1, exh. c) includes a couple more which she could not recall that pertained to wages, pay scale, and vacations.

That evening UAW representative John Colliflower told Nock the Union was the UAW and not the Teamsters, and that the other answers would be presented in the form of the Union's contract proposal once the Union was (voted) in (1:111). The next day, apparently, Chandler asked Nock if she had obtained the answers. Nock told him the Union was the UAW, not the Teamsters, and that the other information would appear in the Union's contract proposal once the Union was in. Chandler made no further comment to Nock about the questions (1:111, 132). I credit Nock's uncontradicted testimony.

I do not find Chandler's conduct coercive. Nock, soon to be named in the UAW's notification letter, openly held conversations with Chandler about the union, and Chandler appeared supportive. Even though an employee reasonably could believe that Chandler was staging a front on behalf of management in order to elicit information, the questions Chandler asked focused on identification of the union, not the employee supporters, and went to contract-type matters—as UAW representative John Colliflower understood by the answers he relayed through Nock. I shall dismiss paragraph 9(b)(1).

d. September 1988 "better walk light" remarks

Added by amendment at the trial (9:1250-1252), complaint paragraph 9(b)(3) alleges that about a date in September Chandler "threatened an employee with loss of employment because of the union activity." The General Counsel

⁷Despite the assertion in the Government's brief (at 6) that the morning of September 13, 1988, Chandler asked Nock to "come into his office," neither the specific date nor the specific location of the conversation is identified in the record. As the Union's first meeting, September 13, 1988, was well publicized, it seems probable that the conversation did occur on September 13 before the union meeting, and I so find.

offered the amendment to conform the pleadings to the evidence elicited from courier Charles B. Samples.

A low partition separated the breakroom into two sections, one for smokers and one for nonsmokers. Chandler did not have a private office. He and the dispatchers used a desk situated in the nonsmokers' area. (1:45, 65; 2:186, 221, 232, 234.) One day in September couriers Charles B. Samples and Walter Paul Stanwood Jr., and possibly other drivers, were seated on the smokers' side of the breakroom discussing the Union. Apparently overhearing the conversation of Samples and Stanwood, Chandler looked in and said (2:369–371): “You better walk light because Security Couriers is trying to get your jobs anyway.”

Stanwood does not describe this incident, and on cross-examination Stanwood testified Chandler made no threats to him. Even so, Stanwood added, Chandler did tell him, shortly after Stanwood began talking about the union, that although Chandler said he would “go for it,” the drivers were likely to get into trouble over it. These remarks of Chandler's are not in Stanwood's pretrial affidavit because Stanwood, not considering the remarks significant, did not report them to the Board agent who took the affidavit (2:281–282). I credit the undisputed testimony of both Samples and Stanwood.

Unlike the previous allegation, this conduct of Chandler I find coercive. It is immaterial that Chandler personally may have meant only a friendly warning to the drivers. The drivers reasonably could have feared that Chandler's remark, an implied threat that EDS would subcontract their jobs to SCI if they did not drop the union talk, was a reflection, even a quote, of management's thinking. As the drivers painfully learned some 2 weeks later, Chandler's implied threat of EDS retaliation accurately reported the plans—and motive—of EDS. The implied threat violated Section 8(a)(1) of the Act, as alleged.

4. Darlene Alexander—September 1988

a. *September 14, 1988 remarks to Martha J. Lance*

Complaint paragraph 9(a)(2) alleges that about September 10 Alexander “interrogated an employee regarding her attendance at a union meeting and threatened employees with loss of their jobs for attending the union meeting and/or if the union was successful.”

In its brief the Government does not point to the testimony the General Counsel relies on in support of this allegation, but apparently it is the testimony of Martha J. Lance. Although the date alleged, September 10, precedes the first union meeting, and the time Lance specifies fits closer to September 14, the variance is slight and immaterial in any event as there was no objection.

Recall that the first union meeting was held Tuesday evening, September 13, at a Holiday Inn with seven employees attending. Courier Martha J. Lance testified that shortly after the first union meeting Darlene Alexander, who was dispatching that morning, engaged Lance in conversation when Lance came in from driving her route. Just the two were present in the dispatcher's area. As Lance was doing her paperwork, Alexander inquired whether Lance had attended the meeting. Lance asked what meeting and Alexander specified the union meeting. “No,” replied Lance (2:182–183, 202).

Alexander said that Nila⁸ and Bonnie⁹ both know better than to do what they are doing because both had worked at Mr. Fine before union activities there closed the Company.¹⁰ Alexander went on to say that the names of the employees attending the union meeting would be placed on a list, the list sent to the executive office, and the jobs of those persons would be in jeopardy. In her final remarks, Alexander, after looking over her shoulder, stated that Security Couriers wanted this job (work) and if the union activity continues and is “enforced” that most likely they will get this job and the EDS-Jacksonville drivers would lose their jobs. On cross-examination, and without objection, Lance testified that she did not really feel intimidated by what Alexander had said. (2:183, 202–205.) I credit Lance's uncontradicted testimony.

Alexander's September 14 remarks revealed the future. Doom lay in store for the drivers if they continued their union activities. Clearly Alexander was disclosing what local management had told the dispatchers. As we see later from credited testimony, on October 11 Alexander reported Allan Balch's reaction to the UAW's notification letter—“The hell with the whole courier department.” Although the Jacksonville management, plus Gibbons, had successfully held off SCI in the past because of the \$20,000 bullet, clearly the initial reaction of EDS to news of the union activities was adverse. Lance's personal courage in the face of this intimidation is not the test of whether the remarks are unlawful. I find then unlawful, as alleged, because they reasonably may be understood as threatening reprisals because of protected activities.

b. *September 14, 1988 breakroom remarks*

Complaint paragraph 9(b)(3) alleges that about September 14 Darlene Alexander “threatened employees with closure of the company and loss of employment because of the union organizing effort.”

Courier Bonnie G. Barnes signed her UAW authorization card on September 14 (2:327–328; G.C. Exh. 12). Courier Walter Paul Stanwood Jr., in the presence of Darlene Alexander, distributed union cards that day in the breakroom to drivers Barnes, Nila Scully, and Daniel R. Schultz¹¹ and secured their signatures (2:253–254). Before Barnes signed the card, Alexander said that Barnes knew better because she knew what had happened when Barnes and Alexander had worked at Mr. Fine where the company had closed and moved when employees tried to bring in a union. If the EDS employees kept on, Alexander added, “they” would close EDS because of the Union. Stanwood asked Alexander if she thought EDS would shut down. Pointing her finger in their faces, Alexander replied, “Just watch and you'll all be sorry.” (2:253–255, Stanwood; 2:330, Barnes.) I credit the undisputed testimony of Stanwood and Barnes.

⁸ Apparently a courier named elsewhere as Nila Scully, although Lance does not so explain. SCI Supervisor Leaver Jo Bailey names Nila Scully as one of the EDS-Jacksonville drivers SCI hired at Tyler (9:1270–1271).

⁹ As we soon shall see from other evidence, it seems clear the reference is to courier Bonnie G. Barnes.

¹⁰ The reference to Mr. Fine was beyond Lance's knowledge because Lance did not live in Jacksonville at the earlier time (2:203).

¹¹ Although Stanwood does not report the given name and initial of Schultz, complaint par. 15, which Respondent's answer admits, names Daniel R. Schultz as one of the terminated drivers.

Drivers Barnes and Shawn D. Nock describe a similar conversation that occurred in the breakroom, apparently around the same date. Other employees were present, including Stanwood, Scully, and Margaret (Hendricks). Darlene Alexander and Shawn Nock were discussing and disputing the merits of unionizing EDS-Jacksonville. Alexander said that if the drivers persisted with their organizing “they” would shut down “MTech.” When Nock inquired why Alexander thought so Alexander replied that it was because it was what Mr. Fine had done when the employees tried to organize there. Nock (whose mother, recall, had worked at Mr. Fine at the time) disputed that, saying that Mr. Fine was in a financial bind and had closed and moved to Mexico where it could obtain labor and materials cheaper and make a profit. (1:133–138, Nock; 2:359–362, Barnes.) According to Nock’s pretrial statement (R. Exh. 1 at 5), at this point Alexander, saying Nock did not know what she was talking about, arose and left.

Alexander’s remarks and finger-pointing in the first conversation establish a violation. Her threatening remarks, tied to the “they” of management, and coupled with the physical intimidation of finger-pointing, combine into coercive conduct. I find that, as alleged in paragraph 9(b)(3), her conduct violates Section 8(a)(1) of the Act. The second conversation, if actually a different conversation, is similarly violative. I consider it encompassed by paragraph 9(b)(3).

5. Ken Dennis—September 1988

a. *September discharge threat about Walter Paul Stanwood Jr.*

Complaint paragraph 9(c)(1) [there is no subparagraph (2)] alleges that about “a date in September” Ken Dennis “told an employee that another employee would be discharged unless he stopped his talk about the union.” Courier Bonnie G. Barnes testified in support of this allegation.

Barnes testified that on several occasions in September and early October Dennis told her that “if Paul Stanwood didn’t shut his mouth about the Union, that he was going to get fired.” (2:328–329) Crediting the undisputed testimony of Barnes, I find a violation, as alleged. Even if Dennis intended to act as a friend in conveying the warning, employees could reasonably believe that Dennis was expressing what management was saying among themselves. The remark unlawfully threatens discharge.

b. *There is a “snitch”*

Courier Walter P. Stanwood Jr. described a September conversation he had with Ken Dennis in the parking lot at Jacksonville. The General Counsel offered the evidence on the issue of knowledge and not to amend the complaint (2:256). On brief the Government expands to contend that the “snitch” comment “created a definite impression of surveillance, tending to foster distrust and suspicion among the couriers regarding the Respondents’ source of information.” (Br. 19.)

Dennis previously had expressed support for the organizing although saying he could not get involved because he was a supervisor (2:281, 290–291). On this occasion in the parking lot Dennis warned Stanwood that the drivers had to be careful because (courier) James Mell was a “snitch” who

had told Allan Balch about the union activity.¹² Stanwood replied that their union activity was no secret because if Dennis knew about it everyone did. Dennis said he thought the drivers were doing the right thing but to be careful, that the drivers were walking on “thin eggs” and were going to get into trouble because the company does not like it (2:255–257, 290–291).

Whether this conversation occurred about September 15, as stated in Stanwood’s pretrial affidavit (2:291), or about “the latter part of September” as Stanwood testified (2:255), is unclear because Stanwood had elements of two conversations in his overall testimony. He concedes he did not include in his affidavit the statement by Dennis about getting into trouble despite its importance. He credibly explains his failure on the basis he simply did not recall it then but does now (2:291–292). Stanwood testified with a favorable demeanor on this and I credit him.

As I view the credited testimony, the principal significance of the “snitch” remark is that it shows management probably began receiving insider information from James Mell even before Stanwood approached Chandler, 2 days before the first union meeting, requesting permission to post a notice of the first union meeting. The “trouble” remark, of course, accurately notified the employees of management’s hostile sentiments.

6. Unalleged statements

a. *Preface*

In addition to the September “snitch” and “trouble” remarks by Dennis to Chandler in the parking lot, remarks *not* litigated as unfair labor practices, there are other comments described in the record and not alleged in the complaint for which the General Counsel does seek violation findings. One of those, a remark attributed to Allan W. Balch, was addressed by Balch when he testified.

As we shall see, the comments summarized here occurred on October 11, the day James L. Gibbons, in the presence of Balch and SCI representatives, notified the Jacksonville couriers that they were terminated because the courier work had been transferred to SCI-Tyler. It is undisputed that the three dispatchers (Alexander, Dennis, and Oliver) were among those terminated. The three former dispatchers were hired by SCI-Tyler as SCI’s Supervisor Leaver Jo Bailey testified (9:1269). Thus, even assuming Alexander and Dennis were supervisors or agents of EDS when they were dispatchers, when they made the statements I am about to describe they no longer were employed by EDS. Even if EDS and SCI are alter egos, and even if the hire dates of the three former dispatchers by SCI are October 11, they apparently were hired by SCI as drivers, not dispatchers. In short, after their October 11 termination by EDS, the three dispatchers no longer could speak for EDS. *Southern Maryland Hospital*, 288 NLRB 56 fn. 1 (1988); Fed.R.Evid. 801(d)(2)(D). For years the General Counsel’s Casehandling Manual (available to the public) has reflected the principle that former supervisors are not agents of the employer. 1 *NLRB Casehandling Manual* 10056.5 (March 1983). The complaint does not al-

¹²SCI Supervisor Leaver Jo Bailey testified that James Mell was one of those hired by SCI after they were terminated on October 11 by EDS (9:1269).

lege any of the posttermination statements of the former dispatchers. Even so, the General Counsel cites them in the Government's brief (at 10–11, 20) in arguing that Alexander, after her separation, further threatened and coerced the Jacksonville couriers. The General Counsel possibly seeks no findings of Section 8(a)(1) violations (Br. 20 is unclear), and no specific findings for these matters are included in the General Counsel's proposed order. I shall make no findings of violations as to these unalleged statements of Alexander and Dennis.

Notwithstanding the hearsay nature of the October 11 remarks by Alexander and Dennis, the Respondent did not object to the testimony. Unobjected-to hearsay is competent evidence and may be given whatever weight its inherent quality justifies. *Passaic Daily News v. NLRB*, 736 F.2d 1543, 1554 fn. 15 (D.C. Cir. 1984); *S. E. Nichols, Inc.*, 284 NLRB 556, 568 (1987), *enfd.* as modified on other points 862 F.2d 952 (2d Cir. 1988). Moreover, the quotation attributed to Balch was fully litigated.

At the first reference to the dispatchers Respondent did object that statements by the dispatchers are hearsay because they are not supervisors. I overruled that objection on the basis it would be decided by the proof (1:25–30). Respondent did not thereafter object that statements by the former dispatchers are hearsay because they no longer had a relationship to EDS, nor did Respondent object that evidence of posttermination statements are immaterial because not alleged in the complaint. Thus, the statements were tried by implied consent.

b. *Darlene Alexander*—“*I knew it*”

When Gibbons told the couriers they were terminated, driver Queen E. Chumbley was sitting next to Darlene Alexander at the back of the room. Chumbley credibly testified that Alexander turned to her and said (1:32, 68):

I knew it, I knew it. The same thing happened to us at Mr. Fine. Every time they try to get a union they either move the place or they'll fire you.

After asking Chumbley about the remarks and the ensuing conversation on cross-examination, Respondent moved to strike the testimony as irrelevant on the basis no connection was shown between EDS and Mr. Fine. I denied the motion (1:69–70).

Driver Martha J. Lance credibly testified that, while the drivers were still in the room after the announcement by Gibbons, Alexander said to several of the drivers that the dispatchers had been told not to sign anything and not to participate in any union activities. Alexander repeated this later that day when they were gathered at Stanwood's home (2:183–184, 208).

A little later that morning the employees went to their exit interviews in downtown Jacksonville. Chumbley and Bonnie G. Barnes rode with Alexander in Alexander's pickup truck (1:33, 72; 2:330–331). As they were driving to the exit interview location, Alexander said (2:330–331):

I told you this was going to happen. I knew it was going to happen but we weren't allowed to say anything to you all about this.

Alexander said that this was the same thing that had happened at Mr. Fine only there they moved the company and terminated all the employees. When Chumbley asked her what had happened at Mr. Fine, Alexander explained that the employees there had tried to get a union and the company did the same as here except it also moved the whole company. “It was all because of the union. Every time it happens,” said Alexander (1:33, 72).

Because Alexander said “we weren't allowed to say anything to you all about this,” I assign some weight to Alexander's remarks. I do not overlook Alexander's strong personal feelings based on her perception of events at Mr. Fine. In light of her perception of events at Mr. Fine, if her just quoted phrase stood alone, the statement could be understood as meaning only that the dispatchers were told to say nothing about the subcontracting. But her statement does not stand alone. It must be considered in light of the other statements alleged as to her, Chandler and Dennis, plus the findings of discrimination I make concerning a formal warning to driver Stanwood and a discriminatory reduction in paid working time. All those findings demonstrate that EDS harbored animus against the unionizing, and that the remarks of Chandler and the others reflect management's hostility against the unionizing. Based on these considerations, I find that Alexander's “we weren't allowed” remark is not limited to the fact of subcontracting and loss of jobs, and I infer that it means also that management told the dispatchers that the reason the drivers were going to be terminated and the courier work subcontracted to SCI was because the Jacksonville drivers were unionizing.

c. *Allan W. Balch*—“*The hell with . . .*”

After Alexander, Chumbley, and Barnes left their exit interviews the trio went to the unemployment office and from there to (Walter) Paul Stanwood's home. At Stanwood's home Alexander stated that she knew when the Union's letter hit Allan Balch's desk and he saw the seven names he said (1:34–35, 74–75; 2:331): “The hell with the whole courier department.”

Addressing this matter during Respondent's examination of him, Balch denies saying this or anything like it. Nor did he say that employees involved with the union would be terminated or that the union activity of the drivers would result in the termination of the Jacksonville courier operation and the transfer of that operation to SCI (8:1231–1232). Reinforcing testimony given earlier on questions by the General Counsel, Balch stresses that Paul Simms had told him by telephone to do nothing, and that he was further instructed on what he could and could not do (7:1143–1144; 8:1232–1233).

Other than testimony by Bonnie Barnes that Alexander said she saw a paper with the seven names (2:331), there is no evidence Alexander was present when Balch returned from the out-of-town convention and read the Union's notification letter of September 14. Alexander's remarks are susceptible to a dual interpretation respecting whether (1) she heard Balch make the statement at some point or (2) that some member of management reported to her that Balch had so reacted.

Operations Manager Tommy D. Treadwell, called during the Respondent's case, testified that Balch, rather than saying “the hell with . . .,” reacted with a serene (10:1362):

“Well, that’s their right. If they want to have a union that’s fine, no problem.”

Treadwell also denies uttering or sponsoring any threats, surveillance, or interrogation (10:1363–1364). Balch and Treadwell each testified with an unfavorable demeanor. Because I do not believe Balch and Treadwell, I accept the credited testimony of the drivers on disputed points. Thus, I specifically find that Balch made the statement Alexander attributed to him. As I find the drivers credible witnesses, it is not necessary that I determine exactly how Alexander learned of Balch’s angry expression of condemnation. Indeed, if job termination can be equated to a living hell, then Balch’s verbal consignment of the drivers to the category of the damned was transformed into reality in less than a month. Balch’s remark is particularly significant because it reveals his willingness—even decision—to drop his past resistance to proposals that the courier work be subcontracted to SCI-Tyler.

d. *Ken Dennis—“Lost jobs because of the Union”*

At some point on October 11 following their termination (former) courier Charles B. Samples and (former) dispatcher Ken Dennis went to the home of Dennis. In their conversation there they discussed their opinions of why they had been terminated. Dennis said he was sure the reason they had lost their jobs was because of the Union (2:371). Crediting the uncontradicted testimony of Samples, I attach no weight to it. The circumstances shown indicate nothing more than the exchange of personal opinions.

D. *Alleged Discriminatory Discipline*

1. Introduction

Earlier, in relation to the issue of supervisory status of the dispatchers, I summarized Respondent’s disciplinary system at Jacksonville. That discussion included a description of Supervisor Robert Chandler’s “brown book.” Although Treadwell testified that being “written up” in Chandler’s brown book did not constitute disciplinary action against the employee, Treadwell, as I noted, admitted that Chandler would come to him whenever the entries indicated a pattern of conduct possibly warranting discipline. At that point Chandler and Treadwell would discuss the matter and they would impose such discipline as they thought necessary.

As I further described, Respondent’s formal disciplinary system consisted of written forms of different colors. One color, white, was either the employee’s copy, or else it served as a first written warning. The record is not fully developed respecting these matters. In any event, at the trial the General Counsel took the position that evidence as to the “brown book” was not offered to show that the entries constituted discipline, but only to assist in showing supervisory status of the dispatchers (2:214–216).

As we see in a moment, the General Counsel apparently relies in large measure on Respondent’s answer to the complaint, at least as to Larry Reagan (who did not testify).

2. Larry Reagan

a. *September 21, 1988—leaving checks*

Complaint paragraph 10 alleges that on or about September 21 EDS issued a warning to Larry Reagan for leaving

a box of checks. (Pars. 19 and 20 allege the warning violated Sec. 8(a)(1) and (3) of the Act.) In its answer, Respondent admits the allegation “only to the extent that on September 28, 1988, Larry Reagan was cited for unsatisfactory work performance.”

Larry Reagan did not testify. The name Larry Reagan is one of the seven listed in the Union’s September 14 notification letter to Balch (G.C. Exh. 39). There is no express evidence that the Larry Reagan of complaint paragraph 10 is the Larry Reagan named in the Union’s September 14 letter. Even so, the courier department (the petitioned-for unit) was small, around 23 or 24 drivers, and the likelihood seems remote that the Union would have two couriers bearing the same name. At no point has Respondent raised a question respecting the identity. I find that there was only one courier named Larry Reagan and that all references to that name are to the same person.

The evidence on this allegation is rather skimpy. Shawn D. Nock testified that Larry Reagan was written up (in Chandler’s “brown book,” presumably) in late September for failing to take a bulk file. The dispatcher is required to mark the trip sheet with such special instructions. Darlene Alexander was the dispatcher that morning, but she failed to indicate on the trip sheet that Reagan was to take the bulk file (1:100).

Driver Stanwood, confirming that Reagan was “written up” for leaving a bulk file, testified that in the past others have left bulk files and not been written up. However, Stanwood attributes the different treatment, in past cases at least, to favoritism shown by Chandler and the dispatchers to, presumably, their friends (2:259–260).

The pages (R. Exh. 12) introduced in evidence from Chandler’s “brown book” (10:1366–1368) contain a page for one Larry “Regan.” Everything on the pages is in handwriting, with most surnames abbreviated to a letter. I find that the Larry Regan is the same person as Larry Reagan, whatever the correct spelling.

Two entries appear on the page for Larry Reagan. The second is crossed out, and I discuss it in the next section. The first entry reads:

9–28–88

did not check hall for work. Did not take bulk file.

Although asserting that the “suspicious nature” of this incident (and the others alleged as to Reagan and Stanwood) “certainly supports an inference of illegal motive,” and contending that the issuance of the “warnings” was inconsistent with Respondent’s past practice so as to support “an inference of discriminatory motive” (Br. 25), the General Counsel fails to analyze the pages and entries in Chandler’s “brown book.” Making that analysis, the Respondent contends the entries do not support a contention that “discipline” increased after the advent of union organizing efforts (Br. 69–70).

Recall from my earlier summary of Darlene Alexander’s remarks on September 14 that she told driver Martha J. Lance that both Nila Scully and Bonnie G. Barnes knew better than to support a union. In the breakroom that same day Stanwood distributed UAW cards to drivers Bonnie Barnes, Nila Scully, and Daniel R. Schultz in the presence of Darlene Alexander. Dispatcher Alexander blasted the judgment of

persons, such as Barnes (and Scully), who had worked at Mr. Fine yet were now signing union cards. Pointing her finger in all their faces, Alexander prophesied: "Just watch and you'll all be sorry."

Did Alexander's union animus carry over to those who signed the cards in the breakroom? The page in Chandler's book for Barnes contains seven entries (not counting one that Chandler voided). Of these, only one comes after the UAW organizing began (on October 1 for failing to unload items at Bank 34; the items remained in her vehicle over the week-end).

Nila Scully's page has two entries, both predating the union activity. The first is very similar to the one at issue: on August 24 she forgot a bulk file at "#61 on Route #5." The second, also on the same date, is also similar: "did not get all work at Bank #80 Kilgore."

Daniel "S." is, I find, Daniel R. Schultz. His page, as Scully's, has two entries, both in 1987. On September 15, 1987, he, it is recorded, forgot to get "#73 Bulk File" from his vehicle, and on October 19, 1987, he allegedly was "riding" the time clock.

In the Government's brief the General Counsel appears to equate entries in Chandler's brown book as formal written warnings. This is done, for example, respecting the second "warning" Larry Reagan received in September–October and which Stanwood was able "to shame Chandler" into tearing up. (Br. 25.) As I described earlier, that is the entry Chandler, at Stanwood's protestations, crossed through. There is no evidence that Respondent had Reagan sign a formal written warning—a procedure Respondent used, as we see in more detail in a moment, as to Stanwood.

The General Counsel contends Respondent's answer admits it issued "disciplinary warnings" to Stanwood and Reagan. (Br. 24.) Although a bit ambiguous on this precise point, Respondent's answer admits (as to par. 10) "only to the extent," then, specifying the date of September 28 (which matches the first date on Reagan's page in Chandler's book), further admits that on that date Larry Reagan was "cited" for unsatisfactory work performance.

Whatever presumption of a warning Respondent's answer establishes, I find that it is dispelled by the evidence. Finding that the evidence falls short of establishing a prima facie case, I shall dismiss complaint paragraph 10.

b. *September 26, 1988—tardy for work*

Complaint paragraph 12 alleges that on or about September 16 Respondent EDS issued to Larry Reagan "a warning for failing to arrive for a 5 a.m. run, which warning was later rescinded." In its answer Respondent admits the allegation except "the appropriate date is on or about October 3, 1988."

The only evidence of a "warning" is the entry in Chandler's book for the date of "10-3-88." On the protestations of driver (Walter) Paul Stanwood Jr., which I described earlier, Chandler scratched through the entry. The scratch-out, with what appears to be Chandler's initials, appears on the exhibit in evidence (R. Exh. 12 at 20). Stanwood argued to Chandler that the 10 a.m. time shown was for leave time (leaving the EDS facility) not the pickup time at the bank, and that therefore Reagan had not been tardy. After offering the excuse Alexander had said that Reagan had not shown

up for his morning route, Chandler crossed out the entry. (2:261–263, 285, 290.)

If Chandler had been disposed to discriminate against Reagan it seems unlikely he would have agreed to strike the entry. If the issue is Alexander's motivation, the inference is just as strong that she made a mistake as it is that she intended to discriminate against Reagan for his UAW sentiments. If EDS intended to discriminate against Reagan because he is one of the seven employees named on the UAW's September 14 letter to Balch, it would seem that it would have told Chandler to refer any inquiries by Reagan (or anyone on his behalf) to Woods, Treadwell, or Balch.

As with the other allegation pertaining to Reagan, any presumption created by Respondent's answer to the complaint is dispelled by the evidence. Finding that the evidence falls short of establishing a prima facie case, I shall dismiss complaint paragraph 12.

3. Walter Paul Stanwood Jr.

a. *Introduction*

Complaint paragraph 11 alleges that on or about September 21 "Respondent EDS issued to Paul Stanwood a warning for failing to take a viewer on a run." In its answer, Respondent admits "the allegations contained in paragraph 11 of the complaint only to the extent that on September 28, 1988, Paul Stanwood was cited for unsatisfactory work performance." As the General Counsel observes in the Government's brief (at 25), the correct date is of little concern because either date falls after Respondent received the UAW's September 14 letter listing (in first place) Stanwood's name. Stanwood associates the date of September 21 with the incident (2:257, 292–293). Driver Queen E. Chumbley recalls the event occurring about a week after the September 13 union meeting (1:30, 59, 92), while driver Shawn D. Nock places it around late September—early October (1:98; 2:171).

Chandler's page (R. Exh. 12 at 23) for Stanwood ("Paul S." which I find to be the designation for Walter Paul Stanwood Jr.) contains five entries. The first three (describing purported mistakes) predate September 1988. The fourth entry is dated September 27 (assertedly took the 11 p.m. clipboard rather than the one for 11 a.m.), and the last entry is for September 28, 1988 (a Wednesday). As that date is in writing, as it coincides with the general date driver Nock recalls, and as the date is not a significant dispute, without further analysis I simply accept Chandler's entry date. Chandler's entry for Stanwood reads:

9–28–88

Did not check Hall for work. Did not take viewer to Bank 7.

b. *Evidence*

Respondent's bank customers use a piece of equipment called a "viewer" to look at microfiche (1:60; 4:553). Presumably the items appearing on the microfiche, and displayed on a viewer, are checks and other documents photocopied by the banks. In any event, a viewer is small, about a foot wide, and not heavy (1:63). Apparently as part of its range of customer services, EDS-Jacksonville repaired broken viewers (2:178). Indeed, as of Gibbons's testimony

on March 17, 1989 (Gibbons testified on three dates), one of Robert Chandler's current jobs for EDS was to repair these viewers (4:553).

Accepting September 28 as the day of Stanwood's warning ("cited"), we first must consider driver Martha J. Lance's testimony about the day before. On September 27 Lance drove route 4 which included bank 7. At bank 7 Lance picked up a viewer and returned it, for repair, to the EDS facility. The viewer was to be repaired overnight and returned to bank 7 the morning of September 28 (2:178). For cross-training purposes, EDS assigned drivers to different routes frequently or even daily (1:22; 2:391; 8:1221). Consistent with that practice, the morning of September 28 Lance learned that Stanwood, not she, was assigned to drive route 4 (2:178). Thus, if everything and everyone had performed according to the cross-training switch, it would be Stanwood who would have returned the viewer to bank 7.

That morning of September 28 a viewer, tagged with a "7," was sitting in the hall (2:257). Apparently this was the viewer, now repaired, that Lance had brought in the previous evening. It was common practice for such items to be tagged and placed in the hall for delivery by the couriers (2:283, Stanwood; 8:1193, Balch). It also is the duty of the dispatcher or Chandler to mark on the trip sheet, or master list, when there was a piece of equipment in the hall to be delivered to a bank (1:99; 2:177). Stanwood testified that it is part of a courier's duties to check the hallway for items because sometimes the trip sheet would not be marked even when there was equipment in the hall to be delivered, although on some of those occasions the dispatchers would tell the driver (2:283). Driver Shawn Nock testified that it was Respondent's practice to put repaired viewers in the hall. Drivers for that route (where the viewer was to be delivered) would take the viewer if they were so told. If the drivers were not told to take the viewer, the drivers, Nock testified, would leave the viewer in the hall (2:171). When they testified, neither Balch nor Treadwell addressed the point.

On this morning, Stanwood, on observing the tagged viewer, went to the trip sheet to check for any special instructions. Finding none, Stanwood loaded his vehicle, exchanged greetings in the parking lot with Darlene Alexander (the dispatcher that morning) and left on his assigned route. Driver Shawn D. Nock, who left just after Stanwood, also had seen the viewer and found the trip sheet unmarked with any special instructions (1:99, 100, 158). On returning after his morning run, Stanwood heard he was in trouble for not delivering the viewer (2:257-258).

As driver Lance went to her vehicle that morning she noticed that driver Melvin Wood, driving route 7 that day, had a viewer in his vehicle. She told Wood the viewer was for bank 7, not route 7. Darlene Alexander, who was standing next to Lance, remarked that the driver had already gone and that she would "hot shot" the delivery herself rather than radioing the route 4 driver (Stanwood) to return (2:179).

Alexander carried the viewer back to the courier's office (1:62). Courier Queen E. Chumbley, who had been standing behind Lance and Alexander, was waiting for her route to be prepared. The bags for her route not yet ready, Chumbley followed Alexander to the office. Wondering aloud who was supposed to take the viewer, Alexander inspected the schedule (the trip sheet, apparently). Chumbley testified, on cross-examination, that when Alexander looked at the schedule she

found that Stanwood was scheduled to take the viewer (1:65). However, Chumbley did not say she inspected the schedule, or trip sheet, along with Alexander. Thus, the opinion elicited from Chumbley that perhaps Stanwood "goofed" (1:65) rests on a foundation of assumptions as to what the trip sheet showed.

In any event, in Chumbley's presence Alexander remarked that if Stanwood could get his mind off the "damn union" and think about what he is supposed to be doing then he could do his job better. Alexander said Stanwood would definitely be written up for this (1:31, 64-67). Driver Nock returned from her run before Stanwood. Nock heard Alexander talking with other drivers in the office about the viewer. Alexander said Stanwood would be written up because he should have taken the viewer to bank 7 (1:100).

Hearing the "trouble" report on his return, Stanwood went to the office where Supervisor Robert Chandler, throwing a piece of paper on the table, said "Sign this." When Stanwood asked what it was, Chandler replied, "Just sign it." Stanwood saw that it was a disciplinary notice, written on white paper, stating that he had left without the viewer. Stanwood signed the warning form and then told Chandler that he had not been assigned to take the viewer. Chandler replied that it was so marked on the sheet. Inspecting the sheet, Stanwood said that the mark was not there that morning. Chandler answered, "Darlene said it was." "Darlene's lying," Stanwood replied. Saying he was signing the form under protest, Stanwood stated he intended to confront Alexander about the matter. When Alexander returned from a trip Stanwood confronted her. Alexander became "hyper," accused Stanwood of failing to check the trip sheet, and stated she had tried to stop him in the parking lot. Stanwood testified that Alexander did not try to stop him (2:258-259).

Recall from my summary of Respondent's disciplinary procedure that the record does not contain copies of any disciplinary warnings. Operations Manager Treadwell testified he does not know what happened to the forms (reflecting disciplinary action) that were written up on the drivers (10:1382), nor does he know which drivers had discipline imposed on them after EDS took over from MTech (10:1377, 1386). From Respondent's answer we know it admits that Stanwood was "cited." Unlike cases involving merely an entry in Chandler's book, we know that here Stanwood was directed to sign a disciplinary warning and that, under protest, he signed.

The witnesses who addressed the point testified that even when mistakes are made the employees are not always written up (1:41, Chumbley; 2:177, Lance; 2:260, Stanwood). As the General Counsel observes (Brief at 25), dispatcher Ken Dennis made a serious mistake when he left an \$85,000 cash letter in his car's trunk. Although this apparently resulted in a cash penalty to the Company for interest lost by the bank, Dennis purportedly was not written up (1:43, Chumbley; 2:275-276, 293-294). Chandler's book, Treadwell testified, contains pages not only for the drivers but for the dispatchers and Chandler as well (10:1367). The page (R. Exh. 12 at 10) for Ken Dennis contains a single entry, for March 8, 1988, reflecting that Dennis "Did not Drop Chandler work off on way up." Although the entry makes no express reference to a cash letter, it is conceivable the entry refers to the cash letter described by the witnesses.

Chumbley testified she was not written up when she left a bulk file around July 1988 (1:41–42), and the five entries on her page (R. Exh. 12 at 9) pertain only to attendance. Stanwood testified that driver Margaret Hendricks left a bulk file but was not written up (2:260), and Chandler's page (R. Exh. 12 at 13) contains only a single entry (respecting not checking keys in April) for her.

Driver Martha J. Lance mistakenly switched the keys to routes 1 and 9. Dispatcher Ken Dennis told her it cost the company \$50,000. Although she does not give the approximate date, she states that an entry was made for them in Chandler's book (2:184, 210–212). Lance's page (R. Exh. 12 at 15) in Chandler's book has several entries (most pertaining to attendance) predating September 1988. For September 27, 1988 the entry states that Lance mixed the keys to routes "9 & 1," causing a "mix up." Although the entry says nothing about MTech sustaining a loss of money, MTech apparently had to pay penalties based on the statement Ken Dennis made to Lance. Despite MTech's financial loss, Lance was not issued a formal disciplinary notice, for she testified the only writeup about the matter was the entry in Chandler's book (2:212).

As I discussed earlier on the allegations respecting Larry Reagan, Chandler's book also contains entries (predating the union activity) about drivers leaving bulk files and making other mistakes. From the credited testimony of the witnesses, we see that Chandler did not always enter mistakes that were made. In short, Chandler's past practice of recording events in his notebook appears to have been sporadic (or based on favoritism as Stanwood asserts), resulting in a mixed bag with little, if any, probative value.

Respecting the past practice on formal disciplinary warnings, all we know is that Respondent did have one, that the employees (as Stanwood here) would sign their acknowledgements of being warned (copies apparently were not always given to the employees), and that the disciplinary notices were forwarded to the executive offices (in Dallas, presumably). Indeed, on several occasions Chandler even showed driver Martha J. Lance disciplinary notices respecting other drivers and told her the forms were being sent to the executive offices (2:213–214). Recall Darlene Alexander's statement about September 14 to driver Lance, when Lance was completing her paperwork, that the names of those attending the union meeting would be sent to the "executive offices" and the jobs of those drivers would be in jeopardy. The formal disciplinary system existed, it was used under both MTech and EDS, and Stanwood was served under that system with a formal disciplinary notice which he signed under protest.

c. Discussion

Respondent defends on the basis no prima facie case is shown because the drivers joked about Chandler's notebook and no disparity is shown by the entries before and after the union activity started (Br. 68–70). Contending the examples show disparity, that Alexander's remarks to Chumbley (about Stanwood) and Lance (jobs of attendees at union meeting in jeopardy), the General Counsel argues that the evidence establishes a prima facie case which the Respondent did not rebut (Br. 25–26).

The General Counsel offers no resolution of the seeming differences in the testimony of drivers Chumbley and Lance.

According to Chumbley, Alexander went inside and, inspecting the schedule, declared that it was Stanwood who was to have taken the viewer. According to Lance, when Lance stated that the viewer was to go to bank 7, not route 7, Alexander exclaimed that the driver had already gone. Under Lance's report, Alexander either knew that Stanwood was the driver who went to bank 7 that day, and knew that he already had gone, or she knew only that bank 7 was on route 4 and that the route 4 driver, whoever he was, already had left. As I find both Chumbley and Lance credible, I shall attempt to reconcile their testimony.

I also credit Sharon Nock and Paul Stanwood respecting their testimony that the trip sheet was not marked before Stanwood left. Recall that the viewer was marked with a "7." That the drivers interpreted the reference as route 7, not bank 7, is shown by Stanwood's leaving the viewer (after checking the trip sheet) and Melvin Wood's taking the viewer for route 7.

When Alexander, followed by Chumbley, went inside the office, this, I find, is what happened. Alexander walked to the schedule. Observing that Stanwood had route 4, Alexander circled bank 7 and, at the same time, declared that the viewer was Stanwood's assignment. She then uttered her remarks about the union and the writeup. The jeopardy threat Darlene Alexander voiced in the office to driver Lance about September 14 reveals that Respondent's management harbored animus against the UAW's supporters notwithstanding the personal sentiments of Supervisor Chandler and dispatcher Dennis. Consequently, Alexander's remark about Stanwood's shifting his mind from the union to his work reflects not only her personal animus, but that of Respondent's management as well.

Moreover, rather than simply recording this seemingly minor event in his book, Chandler, based solely on Alexander's report, prepared and tendered to Stanwood a formal disciplinary notice and told him to sign it over his protest that the trip sheet had not been marked that morning. Even aside from whatever the correct sequence was respecting Alexander and that mark, in light of management's union animus as described by Alexander's jeopardy remark of September 14, Chandler's pouncing on this minor event as an opportunity to issue Stanwood a formal disciplinary warning implies a motive other than the stated one of penalizing improper performance. Finding the stated motive false, I infer that the real motive was the unlawful one of providing a paperwork insulation protecting Respondent from an unfair labor practice charge when EDS discharged Stanwood in the future. *Shattuck Denn Mining Corp.*, 362 F.2d 466, 470 (9th Cir. 1966).

The surrounding facts, which I have described, tend to reinforce that inference. Further reinforcement lies in the words of Alexander. Without checking with Chandler, she remarked that Stanwood definitely would be written up. One interpretation is that Alexander meant she would do it, or have it done, because Chandler accepts her version without question. What her statement actually reveals, I find, is that Alexander had been alerted by Chandler that any reported mistake of Stanwood would be accepted for discipline. In short, Paul Stanwood was a marked man at EDS.

The General Counsel established a prima facie case, but the Respondent failed to carry its burden of showing that it would have formally warned Stanwood even absent his union

activities. Therefore, I find that the Respondent, as alleged, violated Section 8(a)(3) and (1) of the Act when it issued Paul Stanwood a formal disciplinary notice on September 28, 1988. I shall order the Respondent to expunge that warning from its files and to notify Stanwood, in writing, that it has done so.

E. Reduction of Paid Time by 15 Minutes

1. Pleadings

Complaint paragraph 13 alleges that on or about September 26 “Respondent EDS changed its prior existing policy of allowing employees to clock in 15 minutes prior to their scheduled run time, thereby reducing the hours for which employees were paid.” In its answer Respondent admits the allegation “only to the extent that on or about September 26, 1988, Respondent EDS implemented new reporting procedures for its couriers. Pleading further, Respondents aver that the reporting procedures were based on legitimate and non-discriminatory business reasons.”

2. Evidence

The drivers testified that before 1988 they were permitted to clock in 15 minutes before their scheduled reporting times. This 15 minutes would be used for tasks such as checking their route sheets, loading the vehicles, and checking the tires and fuel gauge of their vehicles. After their rather open union organizing began, the drivers were instructed, by posted notice, to clock in at their 5 a.m. starting time. According to the notice (no copy was identified or offered in evidence), the change was because of economic conditions. Orally they were told it was to cut down on the overtime. (1:111–112; 2:194, 269–270, 284, 331, 339, 355.)

According to its answer, EDS implemented new reporting procedures about September 26. The testimony of Managers Allan W. Balch and Tommy D. Treadwell is rather different. They described an overtime problem that developed in the spring of 1988. Although the cause originated in the data processing section, the impact on the couriers was to cause them to sit around, on the clock, waiting for data processing to complete its function. The result was ballooning overtime in the courier department. Balch and Treadwell reduced the overtime by calling the couriers later rather than having them report at set times and by resolving the data processing problem (8:1170–1176, Balch; 10:1356–1357, 1379–1380, 1385–1386, Treadwell).

Asked by Respondent’s counsel about the allegation of complaint paragraph 13, and whether he was aware of any such 15 minute change, Balch testified, “None whatsoever.” (8:1177) Going further, Balch testified that there had been a previous policy of allowing couriers to clock in 15 minutes before their scheduled runs, and that such policy was not changed.¹³ The spring overtime procedures, which carried

¹³ When at least four witnesses had testified about the announcement of the elimination of clocking in 15 minutes before the scheduled runs, I raised the question of whether it was necessary to litigate that point because it appeared that the only dispute (as suggested by the answer) was not the announcement but the purpose of it. I asked Respondent’s counsel, George Cherpelis, if I was correct. Attorney Cherpelis responded, “Yes.” I then stated, “Very well. I think it’s just the purpose behind the announcement is what will be

into September, simply were designed to avoid having couriers sitting around waiting while they were on the clock (8:1177–1178). Balch denies that such (springtime) changes were implemented to penalize the drivers (8:1178). Treadwell confirms Balch’s position that the extra 15 minutes were not eliminated, and that the only change (made in the spring, long before the union activity) respecting the couriers was in tightening up on their reporting times—but they still were permitted to clock in 15 minutes before those reporting times (10:1373–1374). Neither party identified, nor offered in evidence, timecards and schedules of the drivers.

3. Discussion

First, I credit the drivers (Nock, Lance, Stanwood, and Barnes) who testified on this point. Their testimony was specific and the demeanor of each was favorable. By contrast, the demeanor of Balch and Treadwell was poor as to each. I do not believe their denials respecting the elimination of the 15 minutes, nor do I believe Balch’s denial of a motive to penalize the drivers.

Second, I construe Respondent’s unamended answer to complaint paragraph 13 as an evidentiary admission of what it states—that a change was made about September 26 in reporting procedures. That change, I find, was the elimination of the early 15-minute clocking-in practice.

Third, I construe as an evidentiary admission the statement of Respondent’s counsel, George Cherpelis, that the dispute was not over the fact of a late September announcement about elimination of the 15 minutes, but only as to its purpose. In the interest of candor, attorney Cherpelis could easily have moved to amend the answer or sought to modify his apparent stipulation.

Finding that EDS eliminated the 15 minutes, as alleged, I further find, contrary to Balch’s discredited denial, that the reason EDS eliminated the 15 minutes was to penalize the couriers for their union activity. Following and in the same time frame as threats (reflecting management’s hostile sentiments) by Supervisor Chandler and dispatchers Darlene Alexander and Ken Dennis, the purpose, I find, of Respondent’s eliminating the 15 minutes was to reveal to the drivers the economic fist of EDS and to emphasize to them that exercising their Section 7 rights would result in adverse economic consequences for them.

The evidence establishes a prima facie case by the General Counsel. EDS having failed to rebut the Government’s prima facie case by showing that it would have taken the same action in any event, I find that EDS violated Section 8(a)(3) and (1) of the Act by eliminating its couriers’ 15-minute paid time before their scheduled shifts.

in contention, not the actual fact of the announcement.” The Government’s attorney then stated that she would go to her next question. (2:332) On brief the General Counsel refers to the foregoing as a stipulation (Br. 23). If the exchange amounted to a stipulation, the General Counsel waived the stipulation by not objecting to the questions posed to Balch or moving to strike his denial of a change. The Government also contends Balch’s denial “serves to discredit his testimony and also supports an inference that his misleading testimony was intended to conceal an improper motive” (Br. 23). I consider that argument in my discussion.

F. *The Discharge and Refusal to Hire Allegations*

1. The October 11, 1988 termination allegations

The termination events are alleged as follows. Complaint paragraph 14 alleges that on or about October 11 “Respondent EDS closed its Jacksonville, Texas facility and transferred its business to its wholly-owned subsidiary Respondent Security in Tyler, Texas.” Not surprisingly, Respondent, in its answer, denied the allegation. As we know from my background summary, EDS did not close the entire Jacksonville facility, data processing and all, but only the courier operation. Saying that, however, is misleading because EDS did not close it in the sense of selling it. What EDS actually did was to subcontract the Jacksonville courier operation to SCI-Tyler.

Respondent admits paragraph 15 which alleges that on or about October 11 EDS terminated the following 15 named courier drivers and other “similarly situated” Jacksonville drivers:

Bonnie Barnes	Larry Reagan
Queen E. Chumbley	Walter P. Stanwood
Margaret Hendricks	Nila Scully
Martha Lance	Daniel R. Schultz
James C. Mell	Charles Samples
Ray Myrick	Clayton White
A. L. McDaniel	Kenneth Wheeler
Shawn D. Nock	

In conclusionary paragraphs of the complaint, the General Counsel alleges that Respondent violated Section 8(a)(1) and (3) of the Act by closing its courier operation at Jacksonville, transferring it to SCI-Tyler, and terminating its Jacksonville drivers. Motive is the crucial element, of course, and I discuss that element later in conjunction with the alter ego allegation. Accordingly, I defer my discussion and conclusions until later.

2. SCI’s alleged constructive refusal to hire

a. *The allegations*

Complaint paragraph 16 alleges that on or about October 11 SCI required all drivers terminated that day by EDS to file applications as new employees to be considered for employment. SCI admits this allegation.

Also on or about October 11 and thereafter, complaint paragraph 17 alleges, “as a result of the closure of the EDS Jacksonville, Texas facility and the transfer of its [EDS] courier work to Respondent Security in Tyler, Texas, Respondent Security has constructively refused to employ” the following 14 named employees:

Bonnie Barnes	Shawn D. Nock
Queen E. Chumbley	Larry Reagan
Willie Doty	Daniel R. Schultz
Margaret Hendricks	Walter Stanwood
John Jeffrey	Robert Thompson
Martha Lance	Clayton White
A. L. McDaniel	Melvin Wood

Respondent denies the allegations of complaint paragraph 17. Aside from the portion of paragraph 17 reciting that EDS closed the entire Jacksonville facility (rather than just the

courier operation), there is a dispute whether SCI constructively refused to employ the EDS drivers named. The concluding paragraphs of the complaint allege that SCI so acted because of the union activities of the EDS drivers and that SCI thereby violated Section 8(a)(3) and (1). Respondent denies such allegations.

Note that paragraph 17 alleges a *constructive* refusal to employ. The General Counsel does not allege that SCI expressly refused to hire the EDS drivers because of their union activities. That potential allegation would have been complicated by SCI’s hiring of Charles B. Samples, one of the terminated drivers. At his hiring interview with SCI’s William L. Nelson, Samples admittedly wore in plain view his UAW cap and UAW buttons (2:387, 394). After Nelson interviewed him, Samples was sent for a “DOT” (U.S. Department of Transportation) physical examination, a polygraph examination, a background check, and then hired in late October subject to a 90-day probationary period (2:375–376, 382, 387–388). Samples never had to undergo a polygraph while at MTech/EDS (2:387). Some of the employment forms he signed, such as IRS Form W-4 and a medical consent form, identified the employer as EDS (2:381–382). Samples’ paycheck stubs from EDS-Jacksonville (G.C. Exh. 13a) and SCI (G.C. Exh. 14) have the same format and both bear the name of EDS (2:378–380). Although Samples testified Nelson told him that benefits and insurance would be discussed with him after a 90-day probationary period (2:382), Al Albritton testified that benefits were effective immediately for the Jacksonville drivers and no probationary period was imposed on them (6:938).

b. *SCI’s employment standards*

SCI’s Martin V. Coben testified that SCI would try to accommodate EDS the same as it would any other customer and therefore would try to hire the Jacksonville drivers. However, they had to meet SCI’s employment criteria (6:835, 837). George T. Harenchar, SCI’s executive in charge of the transfer, testified he “indicated” that SCI-Tyler would hire any of the terminated drivers who met SCI’s standards (7:1030). Harenchar’s guidance to his hiring managers was that SCI had (would have) a sufficient number of well qualified applicants and that it would be unwise for SCI to hire someone with, for example, a criminal record (7:1035, 1047). After all, Harenchar testified, most of Respondent’s customers are banks and the couriers frequently have keys to the banks (7:1035–1036). He testified that SCI contemplated hiring 18 to 20 drivers—nearly all of the Jacksonville drivers if they qualified (7:1042).

Al Albritton, the manager in charge of the transfer, testified that he told SCI-Tyler manager Nelson to hire as many of the Jacksonville drivers as qualified (6:898). Albritton testified that Nelson and Joseph Gipson did the actual interviewing and had final hiring authority (6:901–902). Nelson testified that he had the final hiring authority (7:1086) and did 90 percent of the interviewing that was done in the second half of October, with Leaver Jo Bailey doing 7 percent, and Joseph’s Gipson 3 percent (7:1093). Bailey testified that she did not interview any of the Jacksonville drivers (9:1261). She helped telephone to arrange for them to be interviewed by Nelson (9:1265, 1279–1280). Joseph Gipson testified that twice when Nelson was busy he asked Gipson to interview a Jacksonville driver. The two Gipson inter-

viewed are Daniel Schultz and Walter Paul Stanwood (9:1314–1315, 1326).

Harenchar testified that he understood Jacksonville's hiring standards to be very lax in comparison to SCI's (7:1036). Certainly Jacksonville's standards were quite simple. At Jacksonville, Operations Manager Treadwell testified, if an applicant passed a personal interview as "qualified" and had a valid driver's license, and if a good report was obtained on the applicant's driving record, then the applicant was hired—without a check for a possible criminal record (10:1359). Apparently because EDS-Jacksonville's courier operation was not regulated as a common carrier, driver-applicants there did not have to pass a DOT (Department of Transportation) physical examination.

SCI's employment standards for drivers are extensive, as described by several witnesses (Coben, Harenchar, Albritton, Nelson, Bailey, and Gipson). The steps and standards are: (1) application, (2) valid driver's license, (3) personal interview, (4) MVR (motor vehicle records check of driving record for accidents or driving violations), (5) background check, (6) polygraph, (7) drug screening test, and (8) DOT physical. Because of the new federal law restricting polygraphs, Harenchar testified, SCI ceased using preemployment polygraphs in late December 1988 or January 1, 1989 (7:1034–1035). As described by Harenchar, the background investigation specifically looked at whether the applicant was over-extended on credit or who had large debts, and a minimum age of 25 was set by the insurance carrier (7:1034). The background investigation would be compiled while the other steps were in progress, with the entire hiring process requiring about 3 weeks, Albritton testified (6:937).

For the Jacksonville drivers, Albritton (6:937) and Bailey (9:1272) testified, SCI waived the waiting period on the background report and hired them subject to an acceptable report. The same was true as to the drug test report, Bailey adds (9:1272).

As Harenchar testified (7:1035, 1047), and as the form reflects (G.C. Exh. 36, Bonnie Barnes; R. Exh. 8, Walter P. Stanwood), SCI's employment application form inquires whether the applicant has "ever been convicted of any crimes other than traffic violations?" If yes, the applicant is asked to explain. A list of 16 questions (R. Exh. 10) Harenchar, Albritton, Nelson, Gipson, and one or two others specially prepared on October 10 and 11 (7:1041–1042, 1089–1090; 9:1326–1327) to ask the Jacksonville drivers inquires (question 5) whether the person has been convicted of a criminal offense in the past 7 years or (question 6) used illegal drugs in the last 7 years. Although Albritton testified that a disqualifying criminal record means conviction of a felony (6:929, 949), the application and interview questions are not so restrictive, and Harenchar testified that conviction of any crime would disqualify (7:1048). Because of the safety factor, Harenchar testified, past use of marijuana could disqualify an applicant (7:1048). Indeed, Nelson disqualified Clayton White because, as Nelson wrote in his December 15 report (R. Exh. 11), White admitted to having smoked marijuana after having taken and passed an EDS drug screen and background check when Nelson told White he would have to take a polygraph. (Nelson's reference to an EDS drug screen and background investigation is unclear. There is no evidence EDS, on or after July 1, required the Jacksonville drivers to undergo such checks.)

Even traffic offenses could disqualify, with either a single DWI, two moving violations, or one accident plus one moving violation on the driving report (the report covers 3 years) disqualifying (6:926–927, 930–931; 7:1033). Interview question 2 asks for this information also (R. Exh. 10).

The question about a criminal conviction is particularly relevant to Stanwood. Although answering on the form that he had no conviction, Stanwood disclosed that he had been placed on 5-years probation, with 2 years left (R. Exh. 8; 9:1317–1318). When Albritton called and reported this to Harenchar, Harenchar responded that SCI needed to hire the best qualified person for any vacancy (7:1057–1058). According to Harenchar, he was told that Stanwood had not inquired about the status of his application. Thus, the matter never came to a decision as to Stanwood and Stanwood was never told he would not be hired (7:1074–1075). I discuss Stanwood's application interview in more detail later.

c. Some were hired and some were rejected

Nelson testified that he received some completed applications from some of the terminated Jacksonville drivers. On receiving the applications he and Leaver Jo Bailey began telephoning the applicants to arrange interviews. About 2 days later, or around October 13, the applicants began coming in for the interviews (7:1095–1096, 1107; 9:1265, 1279).

As I mentioned earlier in this decision, there were 23 or 24 drivers at Jacksonville. When the numbers and names of those hired and not hired are added and compared, it appears that the number of 23–24 does include the three dispatchers. In any event, Al Albritton (6:925) and George Harenchar (7:1043) testified that SCI-Tyler hired nine from Jacksonville. SCI-Tyler Supervisor Leaver Jo Bailey testified that SCI hired as drivers the following nine Jacksonville drivers/dispatchers who applied (9:1269–1271). The three who were dispatchers at Jacksonville are marked with asterisks:

Darlene Alexander*	Mort Oliver*
Ken Dennis*	Charles Samples
Lewis J. Leinback	Nila Scully
James Mell	Kenneth Wheeler
Arlen (Ray) Myrick	

A December 15 internal report (R. Exh. 11) by Nelson, SCI-Tyler manager at the time, describes the application/hiring results respecting the 14-named employees in complaint paragraph 17. Nelson's December 15 report discloses that no applications were received from the following four:

Willie Doty	Shawn D. Nock
A. L. McDaniel	Robert Thompson

Of those four only Nock appeared as a witness. Nock testified that at her exit interview, before Don Woods and a woman from EDS (Dallas), Nock declined the opportunity to fill out an application for SCI. Nock testified that her husband and daughter also were working and they had only one vehicle for the three (1:115), and that she told the EDS woman no, that she could not afford it (the extra cost of transportation, presumably) because of the family situation (1:146). The EDS woman said that Nock might be missing a good opportunity. Nock told her "no thank you," that she would stay home and collect unemployment compensation to

clear her land. Nock explained that she made the statement because the EDS woman had said the terminated employees were eligible for unemployment until they found jobs, and that she would draw unemployment compensation until she found a job. Nock found a job at a plastics company in January 1989 (1:146–147).

In about early November Nock was in Tyler on personal business and, on impulse, went to the SCI office, obtained an application form and took it home. The woman dispensing the application said SCI was not hiring but to bring it back and SCI would keep it on file. Nock does not tell us whether she gave her own name or identified herself as one of the terminated EDS-Jacksonville, drivers. At home Nock completed the application—the employer was identified as EDS on the form—but she never submitted it (1:115–116; 2:165–170).

Nelson's December 15 report reflects that SCI declined to hire three Jacksonville drivers (R. Exh. 11):

John Jeffrey
Walter Paul Stanwood
Clayton White

The report reflects that Nelson interviewed Jeffrey and rejected him because of a “terrible” appearance, a “demanding” attitude, and because “he indicated that he would need to make more money in order to make it to work and back every day. Since I had other applicants that I felt were better suited for the job, I did not hire John at that time.” As for the other applicants, at the same time Nelson began interviewing the Jacksonville drivers, Bailey interviewed five applicants who came in “off the street” (9:1262, 1279).

Nelson's entry for Stanwood reflects that Joseph Gipson interviewed him, and that Stanwood was not hired “because of an assault conviction for which he is currently on 5 years probation, he was very sloppy in appearance, and his attitude left a lot to be desired.” The parties adduced a substantial amount of evidence respecting Stanwood. I shall summarize the relevant portions later.

As I mentioned earlier, Nelson's entry as to Clayton White reflects that White failed to get past the oral interview because he admitted to having smoked marijuana recently.

Seven others applied but did not complete the application process. As to some the evidence is skimpy. The seven are:

Bonnie Barnes	Larry Reagan
Queen Chumbley	Daniel Schultz
Margaret Hendricks	Melvin Wood
Martha Lance	

Barnes, Chumbley, and Lance testified, and I shall summarize their situations shortly. According to Nelson's report, Hendricks found other employment (R. Exh. 11; 9:1266).¹⁴ Stanwood denies this, testifying that Hendricks has been receiving medical care because of an injury received while working for EDS (2:316). Larry Reagan reportedly did not appear for a scheduled interview (R. Exh. 11). Gipson interviewed Schultz who wanted part time work because he al-

¹⁴As I noted earlier in discussing the union organizing, I have used the spelling of Hendricks as it appears in the complaint, although Nelson's December 15 memo spells it “Hedricks” as does the UAW's September 14 letter (G.C. Exh. 39) to Allan Balch.

ready was working at the Rusk State Hospital (9:1320–1321). Whether Schultz had the hospital job while working at EDS is not disclosed in the record. When part time work became available, Nelson's report states, SCI could not reach him to take a (DOT) physical and a polygraph. Bailey testified she tried calling him several times, but she apparently could not recall whether that was for his initial interview or for something else (9:1267–1268). According to Nelson's report, Melvin Wood is a pastor who wanted to devote full time to his church for the balance of 1988. Wood expressed an interest in working after the first of 1989 (R. Exh. 11).

The foregoing survey covers the 23 drivers/dispatchers named in the record. I turn now to the testimony of those who appeared as witnesses.

d. Drivers Chumbley, Lance, and Stanwood

(1) Queen E. Chumbley

At her exit interview courier Queen E. Chumbley accepted an SCI application from one of the EDS representatives, completed it, and tendered it. About 2 or 3 days later a woman (whose name Chumbley cannot recall) called to arrange an interview appointment at SCI. Bailey testified that she called Chumbley (9:1265–1266). Chumbley lives in Rusk. As a map shows, Rusk is a town 14 miles generally south of Jacksonville (G.C. Exh. 37). Chumbley told Bailey that her car was in the shop and that she had no transportation from Rusk to Tyler. Bailey told Chumbley to give her a call when her car was repaired and she would see if anything was still available. It was some 4 to 6 weeks before Chumbley was able to get her car out of the shop. She then telephoned SCI and inquired whether there were any courier openings. A woman (unidentified either by name or as the person Chumbley had spoken with in October) told Chumbley that all the positions were filled (1:19, 36–38, 52–58). Bailey's description is essentially the same as Chumbley's for the October call, but she testified that Chumbley never called back (9:1265–1266).

Chumbley does not say she identified herself on her November call to SCI, nor does she say it was the same person she talked with 4 to 6 weeks earlier. Bailey testified that she shared her office with four other people and that there is a reception area (9:1288). Albritton testified that the first person a job applicant speaks to could be the receptionist, Linda Arnold, or the clerk (6:857–859, 935). Albritton testified that as new drivers were hired (from Jacksonville) SCI would release the temporary drivers to return to their home SCI branches (6:900). Joseph Gipson arrived at Tyler on Sunday, October 9. He was at Tyler a little over a month and, among other tasks, worked with the branch managers to determine how long Tyler could keep their drivers without affecting the branches (9:1311, 1313).

If Gipson left shortly after the last temporary driver did, that would mean that SCI had hired drivers for all of the Jacksonville routes by early November. (The record does not contain a listing of the drivers hired at SCI-Tyler for the Jacksonville business or the dates of their hire.) By about the last week of October, Harenchar testified, a majority, perhaps all, of those needed to drive the Jacksonville routes had been hired (7:1057). In short, by the time Chumbley called around mid to late November, the driver positions in fact had been filled. And if Linda Arnold, the receptionist, had received an

anonymous call inquiring about driver vacancies, she would have told Chumbley there were none.

(2) Martha J. Lance

At her exit interview driver Martha J. Lance received, completed, and tendered an SCI application, but was not contacted by SCI. On November 11, she testified, she called SCI and spoke with SCI-Tyler manager William (Bill) Nelson who said no positions were then available (2:190-191, 216-218). Nelson's December 15 internal report asserts, as to Lance, "We tried to contact her by phone but were not able to reach her." (R. Exh. 11.) SCI-Tyler Supervisor Leaver Jo Bailey could give no information about Lance (9:1266). In his own testimony, Nelson did not address the Lance application.

Although Nelson's December 15 internal report (R. Exh. 11) was received without objection (9:1323), the entry for Lance, in using "we," does not identify who tried to telephone Lance, when the call was placed, and whether there was only one call. Finding Lance to be a credible witness who testified with a favorable demeanor, I credit her testimony. I attach little weight to Nelson's memo entry. Indeed, I find that SCI-Tyler called Lance no more than once as a perfunctory attempt to reach her.

Lance concedes that when she spoke with Nelson (he identified himself) on November 11 that she did not give her name or explain that she was a former Jacksonville courier (2:216-219). She did not do so because she felt she would not get an honest answer if she identified herself because of her union activities (2:241). Recall that Lance was one of the seven drivers named in the UAW's September 14 letter (G.C. Exh. 39) to Allan W. Balch. Not one of the seven was hired by SCI.

(3) Walter Paul Stanwood Jr.

At his exit interview with Don Woods and a woman representative (perhaps from EDS but Stanwood does not know and cannot recall her name), driver Walter Paul Stanwood Jr. declined the offer to fill out an SCI application. Saying he could not see hiring out for the same company that had just fired him, and that he did not want to work for people who treated their employees like animals, Stanwood said he would continue his union activities until the end. The woman representative replied that such was Stanwood's prerogative (2:265-266, 301-303).

Changing his mind a few days later, Stanwood went to SCI-Tyler where he obtained an application from a Bill Nelson, took the application home, filled it out, and returned with it the next day (2:270-271). Although Stanwood and Nelson dispute several points, Nelson agrees that a few days after October 11 Stanwood came to the Tyler office and requested an application from Nelson. "Request" is a mild term, Nelson testified. According to Nelson, Stanwood said that he had sworn to himself he would never drive to Tyler to go to work, but now it looks as if he might have to change his mind. "Get me an application," Stanwood supposedly said. Nelson complied and the following day Stanwood returned with it for an interview (7:1114-1115).

As Nelson further describes the scene (because there were no rebuttal witnesses, Nelson's testimony stands uncontradicted), Stanwood's shirt was wrinkled, with the shirt

tail out, and he projected an overall sloppy appearance (7:1115). Stanwood's application (R. Exh. 8) has two places for his signature and date. The first is on the initial page where he acknowledges he has read the disclosure under 15 U.S.C. § 1601 et seq. (that SCI will request that an investigative consumer report be prepared "which may include information as to your character, general reputation, police record, personal characteristics, and mode of living"). The second signature and date are on the final page. The date of the first signature is October 18, and the second, October 19.

Although there is agreement Stanwood returned the next day (October 19), there is a dispute over whom he talked with. Stanwood testified that when he returned the application he gave it to Nelson who, saying he would have to look over the application, interviewed Stanwood for about 10 minutes. Nelson asked Stanwood why he wanted to go to work for SCI. Because he needed a job and had been working at EDS, Stanwood replied. After going through the balance of the interview (not described by Stanwood), Nelson said "We'll possibly call you" and advised Stanwood he would have to take a polygraph and a physical examination (2:271, 276-277, 304). (The application form states that the applicant agrees to such examinations.) Although Stanwood's application shows the handprinted name of "Joe Gipson" as the October 19 interviewer, Stanwood testified such is incorrect because Nelson was the interviewer. Another man was standing behind Stanwood on the other side of the room, but Stanwood has no idea who that person is (2:304, 306-307).

After waiting 2 or 3 days for Nelson to call, Stanwood called Nelson. Identifying himself, Stanwood said he was calling about his application. Nelson left the telephone a minute, returned and said they had decided to put things on hold, that "We're going to let things cool off," that they were not going to hire anyone right then, but that he would get back with Stanwood. "In other words," Stanwood replied, "don't call you; you will call me." "That's the general idea," or "something like that," Nelson responded, ending the conversation. Nelson never called after that, and Stanwood never contacted Nelson again, Stanwood testified (2:271-272, 310-311).

Nelson testified he had scheduled several interviews for October 19 and could not interrupt them to interview Stanwood when Stanwood returned with his application. Nelson asked Joseph Gipson to interview Stanwood, and Gipson did so and Nelson was not in the room, Nelson testified (7:1097-1098, 1114). Leaver Jo Bailey testified that when Stanwood showed up that day without an appointment he was wearing a dirty blue or green shirt, his pants were wrinkled, and he did not have the appearance of someone looking for a job. As Nelson had to interview Mort Oliver, Gipson interviewed Stanwood (9:1266-1267).

Joseph A. Gipson testified that he interviewed Stanwood when Nelson, who was busy, asked Gipson to do so (9:1314-1315, 1326). Stanwood was dressed sloppy, Gipson testified. Gipson proceeded through his list of 16 questions (R. Exh. 10). To question 5 on the list, asking whether Stanwood had been convicted during the past 7 years of a criminal offense, Gipson testified that Stanwood said he had a felony assault charge and was given a 5-year probation of which there were 2 years left. Gipson does not recall whether Stanwood said he had been convicted. Respecting Stanwood's answer to that question on his application (no

conviction but on probation), Gipson did not ask Stanwood how he could be on probation without having been convicted (9:1316–1318).

Gipson testified that Stanwood expressed no career goals other than that of “to retire” which he listed on his application. The interview lasted 10 to 15 minutes. Afterwards, Gipson told Nelson he did not think Stanwood had a strong desire to work for SCI, that Stanwood still had 2 years left from a probated sentence, and that he, Gipson, did not know if SCI hired drivers who are on probation for a criminal offense (9:1319–1320).

Confirming that Gipson reported these matters to him but made no recommendation (7:1113, 1114–1115), Nelson testified he made the final decision not to hire Stanwood based simply on his observation of Stanwood’s sloppy appearance and his unprofessional attitude. As to the latter, Nelson itemized, in addition to Stanwood’s demanding an application, his statement that he did not want to drive to Tyler to work. “That did not set well with me.” Nelson testified he did not review Stanwood’s application after the Gipson interview, that he does not recall having a telephone conversation with Stanwood regarding the application nor having one with him after the application was filed, but that he never heard from Stanwood (7:1098–1099, 1113–1116).

According to Nelson at the hearing, Stanwood’s probation and possible conviction did not really figure into his decision not to hire Stanwood because Nelson was so unimpressed with Stanwood’s appearance and conduct. Nelson testified he will not have any of his people looking like that or behaving in that manner (7:1115–1116). Notwithstanding Nelson’s testimonial disavowal of any reliance on Stanwood’s probation in a criminal case, as we know from the earlier quotation from Nelson’s December 15 memo (R. Exh. 11), Nelson listed the “conviction” and probation first when giving the reasons he did not hire Stanwood.

In their briefs the parties devote little space and no analysis to this dispute. Although I credit Stanwood respecting his conversation with Nelson when he picked up his application, and his telephone conversation with Nelson about October 21, I do not find that the October 19 interview was with Nelson. Memory plays strange tricks, and it is possible that on October 19 Nelson asked Stanwood a few questions before turning him over to Gipson. However, I need not resolve the mystery of how Stanwood, an otherwise credible witness, could have been mistaken as to this.

e. Bonnie G. Barnes, Leaver Jo Bailey, and complaint paragraph 9(d)

(1) Allegations

Complaint paragraph 9(d) alleges that SCI, acting through “Lavera” (litigated as Leaver Jo Bailey), did the following at Tyler on or about October 24:

- (1) Told an employee that they had lost their jobs and not been permitted to transfer from Respondent EDS to Respondent Security because of the Union.
- (2) Interrogated an employee about whether she favored the Union.
- (3) Told an employee that they did not want the Union in that office or around the Tyler office.

In its answer Respondent denies the allegations. The General Counsel’s supporting witness is Bonnie G. Barnes.

(2) Evidence

During her exit interview with EDS representative Glen Manning and an SCI representative (name unknown to Barnes), Barnes was given an SCI employment application by the SCI representative. Barnes completed the form and returned it at the interview to the SCI representative (2:334–335, 340–341).

The record contains a “Security Couriers” application for employment form (G.C. Exh. 36) completed on October 11 for Bonnie Grace Barnes of New Summerfield, Texas. Received later in the hearing (6:914), the form differs in some respects from the one (R. Exh. 10) completed by Stanwood a week later. The General Counsel adduced evidence showing that different employment forms were used about this time. At the hearing I expressed a desire that the parties address the relevance of this in their briefs (9:1302–1303). The parties did not pause to do so. A significant difference between Stanwood’s application and that of Barnes is that Stanwood’s has a page for a second signature by the applicant plus a section to be completed by the interviewer. There is no such page attached to the application of Barnes. Whether there is such a page, which did not get attached for the exhibit, is not expressly disclosed in the record. If there is not one, however, it means that Barnes did not sign to certify the truth of her answers nor agree to medical and polygraph examinations. Considering that highly unlikely, I find that the exhibit for Barnes is incomplete.

Around October 20, Barnes testified, Robert Chandler called her. As of that time Barnes had not heard from SCI. Chandler told Barnes she needed to go to SCI because SCI was hiring people off the street. Barnes then called SCI and spoke to “Bill” (Branch Manager William Nelson) who set an interview appointment for her (2:335). In his December 15 internal memo (R. Exh. 11), Nelson states that he did interview Barnes.

Barnes went to Tyler and interviewed with Nelson who arranged for Barnes to take a polygraph test and a physical examination (2:336). Whether Nelson called himself or had some one else call is not disclosed by Barnes. Leaver Jo Bailey testified that she called to make the appointments for Barnes (9:1262–1263, 1280, 1282, 1286–1287).

On the date set for her examinations Barnes had a cold and congested lungs. The polygraph firm, Andrews Polygraph in Tyler, informed Barnes they could not test her because her congested lungs would produce false readings. The man at the firm, Andrews apparently, advised her to call him and set another appointment after she got over her cold. Barnes then went for the medical examination which she received along with some medicine for her congestion. From there Barnes went to the SCI office (2:336, 341–343, 345–346). To this point there is no major difference in the testimony of Barnes and Bailey. The major disagreements begin in the account of what happened on Bailey’s return to the office. Nelson does not address the topic in his testimony, although he does so in his December 15 internal memo (R. Exh. 11).

Arriving at the SCI office on this second occasion, Barnes entered and met a woman in an office. Wearing a uniform with captain’s bars, the woman identified herself as a super-

visor. Barnes understood her name to be "Lavera Jo."¹⁵ Barnes gave Bailey (I find it was Bailey) the medical results, reported what the polygraph agency had said, and asked if she could speak with "Bill" because she had a question to ask him. Bailey escorted Barnes to Nelson's office, but Nelson was busy with someone. They returned to the front where Barnes sat at a table and Bailey joined her. At the table, Barnes testified, and Bailey denies, the two held a conversation (2:336, 343, 346, 356-357).

After Barnes and Bailey had conversed for a few minutes at the table, Barnes asked Bailey if it would not have been a lot simpler to transfer the EDS drivers from Jacksonville to the EDS department in Tyler. Bailey said "You know why." "No I don't," Barnes replied. Bailey then said (2:337, 347): "It's because of the union. We do not want the union in Tyler." "That is why," Bailey continued, the Jacksonville drivers could not be transferred, because of the union people at Jacksonville.¹⁶ Bailey then asked: "Are you for the union?" "No," replied Barnes, testifying that she lied because she felt it was none of Bailey's business and because Barnes knew she would not be hired if she told the truth (2:337, 347).

Eventually, after 15 to 20 minutes, Nelson was available and Barnes went and asked him why SCI had given Darlene Alexander a starting hourly rate of \$5.25 but was going to pay Barnes only \$4.70. Nelson said it was because that was what Alexander had been paid at Jacksonville while Barnes had been paid only \$4.62. Barnes told Nelson about the polygraph, that she would have to take it later. Nelson said that was okay. Barnes said nothing to Nelson about the union and she did not tell Nelson what Bailey had just told her about the union (2:344, 348-349).

When Barnes arrived that day at the Andrews Polygraph firm she had to produce her driver's license. The receptionist there noticed that the license had expired. Barnes testified that so far as she knows there was no outstanding warrant for her. Her license has been reinstated, she testified (2:349-350). According to Nelson's December 15 internal report, Barnes told him her license had expired and there possibly was an arrest warrant over her failure to appear as promised. Offering (unobjected to) hearsay from Cindy Andrews, the receptionist at the polygraph firm (9:1262, 1283), Bailey states that Barnes had gotten a ticket, applied for a defensive driving course [to avoid the fine, apparently], but through ignorance had not perfected the necessary steps. As a result, a warrant was issued for her arrest and she could not get her license renewed without paying the fine (9:1263-1264, 1285).

Nelson concludes his report about Barnes by stating (R. Exh. 11):

¹⁵ Bailey does not address the point of captain's bars. Albritton testified that Bailey's uniform does not differ from the one worn by other drivers. He concedes, however, that at one time captain's bars were worn to indicate dispatchers, utility drivers, "anything," although not everyone wore them (6:950-951). When Barnes was in Bailey's office, a second woman entered briefly. She was wearing the same uniform as Bailey. Although Barnes is not sure the woman's uniform had no bars, she did not notice any (2:357).

¹⁶ Barnes does not know where Bailey got her information, but she accepted what Bailey said (2:359).

I told her to get her driver's license renewed and [to] take care of her business concerning the warrant and everything would be fine. She was then rescheduled to take the polygraph at a later date. I told her that if she was still not feeling well on the day the polygraph was scheduled to give me a call so I could cancel the appointment. She did not show up for the polygraph, she did not call me, and I have not heard from her since.

Barnes testified that she did call the polygraph firm and make another appointment, but she did not keep it. She never went back, Barnes testified, because she knew that if they found out she was for the union she would be fired again. Also, "I have to drive 60 miles from New Summerfield" to SCI at Tyler, Barnes testified (2:338, 342). As the map in evidence reflects that the one-way distance between New Summerfield (southeast of Tyler) is 29 miles (G.C. Exh. 37), Barnes was giving the roundtrip distance from her home to the SCI office. She testified that from her New Summerfield home to Tyler is 13 miles (2:338). Thus, the extra daily commuting distance would be 17 miles one way or 34 miles roundtrip.

Field Supervisor Leaver Jo Bailey denies ever speaking face to face with Barnes (9:1264, 1284). Respecting the hiring process for the Jacksonville drivers, Bailey testified that her function was limited to calling the applicants and arranging interviews and examination appointments. She had no other contact with them other than to see them when coming and going through the Tyler office, although in that manner she probably saw Barnes (9:1261-1262, 1265, 1279-1280).

Bailey thinks she telephoned Barnes to give her the date for the first polygraph appointment, but she is not certain (9:1263). It was Bill Nelson who told Bailey that Barnes was too sick to take the polygraph (9:1264, 1285). "So she called back," Barnes testified (9:1262). Apparently that was a couple of days later because Bailey at that time made a second appointment with the polygraph agency. The second appointment was set for about a week after the first (9:1262, 1285). Bailey called Barnes, identifying herself as "I'm Jo Bailey with Security Couriers." At no time did she tell Barnes she was a supervisor. She notified Barnes of the appointment (9:1262, 1285). According to Bailey, the only time she talked with Barnes was over the telephone (9:1284). Some 30 minutes after Barnes was due for her second appointment, Cindy Andrews called Bailey and reported that Barnes had failed to show. Bailey testified that Barnes had not called (SCI, apparently) to cancel and that she had not called SCI since then (9:1263, 1285). Bailey testified that she assumes Barnes passed the oral interview and was considered hireable because SCI does not spend money for polygraphs and medical examinations unless it intends to hire them—contingent on a valid driver's license and the other checks (9:1287, 1303).

Bailey denies that Barnes gave her the medical test results, testifying that Barnes gave it to Nelson (9:1282-1283). According to Bailey, she never told Barnes that the reason the Jacksonville drivers were not transferred to Tyler was because of the union. Although she knew Jacksonville had union supporters, she denies asking Barnes if she was for the union, and she denies telling Barnes that SCI did not want the union in Tyler (9:1264-1265). Nelson discloses that about 2-3 months before October 11 he overheard a discus-

sion among the Tyler couriers that union pamphlets had been distributed at Jacksonville (7:1104–1105).

(3) Discussion

Courier Bonnie G. Barnes testified with a favorable demeanor and I credit her. Moreover, even though Barnes became confused at one point in the sequence of events, she testified with more coherent consistency than did Bailey. I do not credit Field Supervisor Leaver Jo Bailey, whose demeanor was unfavorable, and whose testimony was marked by a certain jumbled presentation. Frequently it is unclear whether she is testifying from personal knowledge or from another source, and the points she describes are sometimes not detailed so as to explain clearly the incident she attempts to describe.

Finding that Field Supervisor Bailey remarked as alleged in paragraphs 9(d)(1), (2), and (3), I further find that such remarks and interrogation by statutory agent Bailey, to a driver recently fired by EDS in the midst of a union campaign, were coercive and violative of Section 8(a)(1) of the Act. Clearly Barnes was justified in fearing that pursuing her application at SCI would be futile.

3. Discussion deferred

Before discussing the constructive refusal to hire allegation, I first shall summarize the alter ego allegation. In the final section, Analysis and Overall Conclusions, I discuss the transfer and termination allegations plus the constructive refusal to hire allegation.

G. The Alter Ego Allegation

1. Introduction

Complaint paragraph 4 alleges that on or about October 11 EDS established SCI, its wholly-owned subsidiary, “as a subordinate instrument to and a disguised continuance of Respondent EDS for its courier business.” “By virtue of” such conduct, complaint paragraph 5 alleges, EDS and SCI are “alter egos and a single employer within the meaning of the Act.” Respondent (EDS and SCI) denies the allegations of paragraphs 4 and 5.

The allegation of “alter egos and a single employer,” unfortunately a typical phrasing for this type of case, is ambiguous. Is the Government here using “single employer” as a synonym for alter ego, or is the General Counsel alleging a dual concept? The two doctrines are conceptually distinct. *Marino Electric*, 285 NLRB 344, 351 fn. 29 (1987). At the hearing the General Counsel stated that the Government was not alleging single employer as an independent theory (3:421). Although the two doctrines, in determining their applicability, consider, with one exception, essentially the same factors, the analytical focus is different. *Marino*, supra at 351. For single employer cases the focus is “the interrelatedness of the employers,” whereas for alter ego analysis the focus “is on the existence of a disguised continuance or an attempt to avoid the obligations of a collective-bargaining agreement through a sham transaction or technical change in operations.” *Carpenters Local 1846 v. Pratt-Farnsworth*, 690 F.2d 489 (5th Cir. 1982).

In resolving questions of alter ego status, the Board considers a number of factors, no one of which is controlling. Distilled from the cases,¹⁷ the factors usually listed include:

- (1) common ownership, control, management, and supervision;
- (2) common business purpose, customers, and operations—that is, whether the employers constitute the same business in the same market;
- (3) common premises and equipment;
- (4) absence of “arms length” transfer;
- (5) motive for the transfer was to evade responsibilities under the Act.

2. Common ownership, control, management, and supervision

Both MTech and SCI are wholly owned subsidiaries of EDS. I refer to MTech because there is no evidence MTech has been dissolved as a corporate entity. For all practical purposes EDS has been operating EDS/MTech-Jacksonville as a division of EDS.

Ultimate control follows ownership. Managerial control of SCI potentially rests with EDS. The EDS roster of officers and directors appears at page 16 (G.C. Exh. 47) of EDS’s 1988 annual report. SCI’s listing of officers and directors is in evidence (G.C. Exh. 30). As already noted, Martin V. Coben is the chairman of SCI’s board of directors as well as SCI’s president and CEO (6:740–741, 817). SCI’s other three directors are Lester M. Alberthal Jr., J. Davis Hamlin, and Dean Linderman (G.C. Exh. 30). Alberthal is the president, CEO, and a director of EDS, Hamlin is a senior vice president, chief financial officer, and a director of EDS, and Linderman is a senior vice president and a director of EDS (G.C. Exh. 47). Four EDS officers hold four of the eight vice president positions at SCI: John R. Castle Jr., Claude K. Chappellear, J. Davis Hamlin, and Anthony E. Weynand (G.C. Exhs. 30, 47).

EDS is organized along an “industry group” basis (5:594–595, 675) with SCI included within the Financial Services Division (FSD) (5:595; 6:776; G.C. Exh. 31). We have seen from the testimony of Gibbons and his reporting to Connor and then to Ben Sims that MTech also fell within the FSD. As previously summarized, during the critical time period of July through October 1988 Ben Sims was in charge of the FSD—and the FSD organizational chart so reflects (G.C. Exh. 31). That division is part of the Financial Industries Group, or FIG (5:649–650). Sims testified that Coben runs SCI on a day-to-day basis (5:712). In March 1989 Sims was moved from FSD and put in charge of the commercial insurance division (5:649). Bob Lund succeeded Sims as head of FSD (6:774). Coben testified that he has seen Lund only half a dozen times since he began reporting to Lund (6:789). Coben recalls that Lund took over about October 1988 (6:752, 808). Lund has been to Coben’s office only once, and when Coben has gone to Lund’s he discussed numbers and not how Coben operates SCI. According to Coben, his contract gives him the right to manage SCI

¹⁷ *Weinreb Management*, 292 NLRB 428 (1989); *Fugazy Continental Corp.*, 265 NLRB 1301 (1982), *enfd.* 725 F.2d 1416 (D.C. Cir. 1984). As Chairman Stephens has expressed it, without the motive factor, the alter ego test is indistinguishable from the single employer test. *Precision Builders*, 296 NLRB 105 fn. 1 (1989).

(6:817). Even so, we have seen that an EDS executive (Ben Sims at first) controls policy, and Lund inquires whether Coben has any problems or issues which they need to discuss (6:816).

Also as previously noted, SCI hired George T. Harenchar from EDS as Coben's "alter ego," general manager, and heir apparent. Harenchar went to SCI after being "contacted" by Ben Sims about switching to SCI (7:960-961). The first person Coben has ever hired in an executive position, Harenchar did not even fill out an employment application (6:832, 847). Recall that Coben's employment contract is for 5 years only with no assurance of a renewal (6:849-850). Coben testified that EDS probably has no intention of acquiring expertise in the courier business (6:844). Notwithstanding Coben's view that EDS probably does not plan to acquire expertise in the courier business, it is clear that EDS placed Harenchar, one of its own people, at SCI so he could learn that business and take full charge when Coben departs when his 5-year contract expires. I so find.

Aside from Harenchar's presence as general manager and heir apparent to the CEO position at SCI, routine management and supervision of SCI's daily courier business, so far as the record reflects, is conducted by SCI's local and regional managers. (However, the evidence focuses on SCI-Tyler rather than on an in depth study of SCI's corporatewide operation.)

Common ownership by a very large corporation such as EDS usually brings to the wholly owned subsidiaries standardized benefits. That is so here. Previously we saw how the MTech-Jacksonville employees were informed in meetings of their new package of EDS benefits. Coben testified that the EDS package of benefits (including insurance, medical, and pension) also covers SCI, and SCI employees are paid by payroll checks from EDS (6:753). As both Al Albritton (6:931-932) and Leaver Jo Bailey (9:1289, 1292, 1301) testified, SCI now uses certain EDS registration forms in the employment application process, and the parties stipulated (8:1242) that an EDS employment agreement form (G.C. Exh. 46) is used by SCI.

3. Common business purpose, customers, and operations

In the traditional alter ego case the business, or the major portion of it, is transformed by sham paper transfers into a disguised continuance that, ordinarily, matches the size and shape of the entity from which it came. Comparing business purpose, customers, and operations is visibly logical in the traditional alter ego case. Usually the disguised continuance is in the form of a new corporation as in *Watt Electric Co.*, 273 NLRB 655 (1984). That situation does not prevail here because SCI has been in business for many years.

Comparing EDS and SCI, Respondent contends the two do not share a common business purpose or nature of operations (Br. 35). Certainly their central business character or purpose is different. With 50,000 employees worldwide (5:712), and total revenues of Sims' FSD division nearing \$1 billion (5:701),¹⁸ EDS provides data processing and data communication services. EDS represents, Ben Sims testified, the finest quality of product and service in the area of information

technology (5:713). Operating mostly in Texas with about 350 employees (G.C. Exh. 23), SCI is tiny by contrast with EDS. SCI's business purpose, and apparently its sole business function, is to transport, for customer financial institutions (banks, primarily), business information point to point (6:814, Coben; G.C. Exh. 23; pleadings). SCI does no data processing (6:814). Like EDS, MTech was engaged in providing data processing services, primarily to certain banks (3:447, Gibbons; 5:701-702).

Ben Sims gave extensive testimony about EDS's leveraging of MTech's \$350 million (purchase price) business into the EDS operation and how that merger would vastly improve EDS's service to its customers by leveraging MTech's MPACT EFT (electronic funds transfer) network as well as picking up the expanded business (5:698-703). Similarly, although SCI's book value was only an "infinitesimal" part of MTech's \$270 million book value (5:658, 700), and SCI only a "small piece" of MTech (5:698), Sims testified that EDS wanted to leverage SCI's transportation expertise in EDS throughout Texas and elsewhere in the country, and as quickly as possible (5:670, 676, 683, 689, 699). Although the primary business functions of EDS and SCI are therefore different, SCI's courier service most certainly is complementary to EDS's operation. Indeed, that is the way Gibbons describes SCI as to its acquisition by MTech (5:629).

Perhaps the comparison should not be between SCI and EDS, but of EDS/MTech-Jacksonville's courier operation to SCI-Tyler. With that comparison we see that SCI-Tyler acquired practically everything except the union supporters. SCI took over the work of servicing the customers the EDS drivers had been serving,¹⁹ and did so using the same vehicles. (The EDS vehicles were leased to SCI although possibly some were used on SCI's other routes.) SCI must pick up and deliver to and from the EDS/MTech facility at Jacksonville. The record does not disclose whether the SCI drivers use the break room at Jacksonville. Perhaps they do not because driver Martha J. Lance, when she and Bonnie Barnes returned their uniforms a few days after the drivers were terminated, observed that the tables, chairs, and vending machines already were being moved out (2:193, 219).

Coben testified that EDS accounts for only 5 percent to 10 percent of SCI's business (6:813, 840). Even so, former Tyler Branch Manager William Nelson testified that before Tyler took over Jacksonville's work the EDS portion of Tyler's business was about 30 percent. After the October 11 consolidation, Nelson testified, the EDS percentage jumped to 65 percent to 70 percent of SCI-Tyler's business (7:1105).

4. Arm's length negotiations

When the negotiations were arms length between MTech and SCI the result was "No deal." The \$20,000 factor was too big an obstacle. Even after MTech and SCI were part of the EDS corporate family the disagreement continued. Ben Sims, the corporate parent, broke the sibling impasse by deciding (the nature of the decision is in question) in favor of SCI-Tyler and consolidation. The controlling viewpoint was that of the corporation. "It's all my money," Ben Sims declared. In that respect the revealing statement of Sims bluntly reflects a maxim of the real world of corporate relationships: where subsidiaries are wholly owned, the parent firm takes

¹⁸As earlier noted, the 1988 gross revenues for all of EDS exceeded \$4.8 billion.

¹⁹Stipulation (3:426-427).

the view that it owns all the cash. *Marino Electric*, 285 NLRB 344, 352 (maxim stated by witness Barineau).

At the level of Ben Sims, there was no arm's length negotiations. Everything—all considerations—submitted to the absolute control of EDS for whatever Ben Sims saw as being in the best interest of EDS. Exercising the absolute control that complete ownership gives, Ben Sims decided in favor of SCI-Tyler. The arm's length factor points toward an alter ego conclusion.

5. Motive

(a) *Coben's August 3, 1988 memo*

Ben Sims decided that Jacksonville's courier business should be transferred to SCI-Tyler. Of that there is no dispute. The questions are, when did he decide it and why. Before the UAW activity at Jacksonville did Ben Sims tell Martin Coben to get busy leveraging? I have found that he did so at the July 1988 staff meeting. But was anything said about Jacksonville, that place with a built-in \$20,000-a-month obstacle to any transfer of its courier business? Respondent says yes, citing testimony of Sims at 5:687 (Br. 38). As his full testimony at that point makes clear, Sims made a general exhortation, not a reference to Jacksonville (5:687-688).

At that July staff meeting, Coben testified, Sims inquired how Coben was doing with "taking over the transportation generally." Coben replied there were a number of places SCI was looking at and Jacksonville was one of them (6:759). Coben understood the acquisition of MTech by EDS to be a "golden opportunity" (6:792) [for leveraging] because it opened up "some sales opportunities" for SCI to "go call on those customers [EDS units] and get some business." (6:761) Coben does not claim that specifically at the July staff meeting he mentioned any problems associated with obtaining Jacksonville's courier business. Coben expressly denies that Sims ever told him to consolidate Jacksonville with Tyler (6:760, 791).

As we saw from the earlier quotation of Coben's August 3 memo (G.C. Exh. 26) to Ben Sims, Coben there reports on his plans. The first item he discusses on his agenda in that of Jacksonville. (We do not have whatever listing follows except for the first paragraph of a reference to Chicago.) Recall the August 3 memo as containing the cryptic "I have assigned Tom Harenchar the duties of converting this [Jacksonville] operation to our format as of this date." The completion date was set for September 3.

Coben's August 3 memo is ambiguous. In the first paragraph he mentions the financial obstacle to any assumption of the work. Apparently referring to a time after the EDS acquisition of MTech, Coben states, "We have subsequently evaluated this operation and determined" that the financial roadblock is too much. Then, strangely, Coben writes of assigning Harenchar the task of "converting" Jacksonville to "our format." Coben testified that by "our format" he meant to convert Jacksonville to one of SCI's customers (6:810). Does that mean Ben Sims, as of August 3, had decided to transfer Jacksonville's courier business to SCI-Tyler and assigned that task to Coben? For several reasons I find the answer to be, No.

(b) Did Ben Sims and Martin Coben discuss the Angenend letter?

As mentioned a moment ago, Coben denies ever receiving an express assignment to take over Jacksonville's courier business. For his part, Ben Sims never directly testifies that he made that decision or assignment, although in a back-handed fashion Sims does say he did. Thus, in reference to the Angenend letter (G.C. Exh. 25b) casting doubt on the lawfulness of Jacksonville's courier operation, Sims testified that in about July Coben told him of the letter. According to Sims, on that occasion he told Coben that the letter (emphasis added) (5:667):

[G]ave us another piece of evidence and indication that the *decision* that we previously had made, to consolidate that activity into Security Couriers, was a solid piece of business strategy.

What "decision" is Sims referring to? As I have noted, Coben expressly denies that Sims ever told him to consolidate the Jacksonville courier service with that of SCI-Tyler (6:760, 791). Sims apparently refers to other testimony he gave about an April conversation with Coben. Actually, Sims goes back to March, saying he first met Coben during the "due diligence" process when they had a general discussion about EDS's taking advantage, in Texas and around the country, of SCI's courier services (5:688-689).

Coben says the two did not meet until after the initial acquisition stage of April 19 when Sims came to introduce himself and they talked about such things as Coben's CEO position and his contract (6:843). That also would have been a logical time to discuss direction and goals for SCI. Coben elsewhere recalls, apparently referring to this same visit by Sims, that he spent some time explaining the courier business to Sims and Sims was delighted EDS now had SCI's transportation expertise. Coben understood Sims to be of the opinion that SCI should take advantage of [leveraging] opportunities within EDS. Coben saw the acquisition as a "golden opportunity" for SCI to acquire the Jacksonville courier business (6:791-792). (Coben does not testify he mentioned Jacksonville on that occasion to Sims.)

Coben's description of the first meeting seems to fit Sims's description of the extended conversation (which Sims nudges into "March/April" and then into April, 5:690) in which they made a "decision" to integrate SCI's resources, to leverage those resources, and to "figure out a plan that allows us to go forward and do this as quickly as possible." "It was . . . it was a business decision that appeared so intuitively correct and obviously correct that, as we talked to each other about initiatives we wanted to undertake, that was always on the list of things that were logical, made sense, and we wanted to move forward with." (5:689-690.)

I find that this initial get-acquainted meeting, and goal-discussing conversation, occurred in Coben's office in April, a few days after April 19. I further find that Jacksonville was not mentioned. Indeed, it is debatable whether there was much discussion at all about SCI's taking advantage of (leveraging) opportunities within EDS because Coben, testifying earlier in response to questions by the General Counsel, tells us he is not sure he and Sims ever discussed sales opportunities. "I think it was an assumed thing. We're in that business and we're looking for opportunities and they

just gave us the opportunity in talking with . . . in now being acquired by EDS, that they had all these customers around that hopefully we could go call on those customers and get some business. And that's the net of it. It opened up some sales opportunities for us." (6:761.)

And notwithstanding the grandiose testimony by Ben Sims about the benefits of leveraging MTech, with the same concept applying to SCI (5:705), Coben tells us there has not been, to his knowledge, any effort to provide EDS sales and customer service representatives with training on (how to leverage) SCI's expertise (6:782). Not only is that so within the FSD (the division now run by Bob Lund), as just described, but also respecting even discussions at the officer or senior manager levels in any of the other EDS divisions (6:760).

Ben Sims testified that the decision to leverage SCI was a "no brainer" from the start. That is, Sims did not spend a lot of time deciding the smart thing to do with SCI's expertise would be to integrate its services (5:695–696). Regardless of whether the matter qualifies as a "no brainer," it seems to have been given "back burner" status for several months. The question, however, is whether a decision was made—before September 22—that SCI-Tyler should take over Jacksonville's courier business. At several points Ben Sims testified he doubts that anyone could have mustered the courage to bring to him, at his corporate viewpoint level, such a provincial outlook of a mere \$20,000 a month loss by Jacksonville if SCI-Tyler assumed Jacksonville's courier work (5:682, 697, 705) when, at Sims' corporate level, "It's all my money" (5:709). In Harenchar's words, it is just like taking money from one pocket of Ben Sims and putting it in his other pocket (7:988, 1022).

Sims' pompous puffery is unpersuasive.²⁰ Had the issue of SCI-Tyler taking over Jacksonville's courier business been raised at the July staff meeting, Connor surely would have raised the \$20,000 factor. As we know, eventually the two factions did bring the problem to Sims. No good reason exists to suggest they would not have done so sooner—at the July staff meeting—had there been cause to do so. There was no reason to do so, I find, because Jacksonville, to the extent it was mentioned at all there, was mentioned only as an SCI target. That was nothing new to the EDS/MTech faction. What would have been new would have been a discussion about getting the situation "legal" at Jacksonville. That logically would have prompted Connor to raise the \$20,000 a month bullet. As the \$20,000 bullet was not raised before Ben Sims until September 22, we know it was not mentioned at the July staff meeting of Ben Sims. It follows that any mention there of Jacksonville was nothing more than as an SCI sales target. I so find.

According to Coben, at some point after the April 19 initial acquisition, and "way before" his August 3 memo to Ben Sims, he took the March 14 Angenend letter to Ben Sims and discussed the legality question with Sims (6:788, 791, 793–794, 818). Sims places the event (5:695) as being around a July (5:666–667) or early summer timeframe (5:706). Sims has no recollection that they went into all the specifics, but Coben indicated that the contemplated change,

in line with his earlier (April) decision, would cure the legal problem (5:714–715).

As I noted earlier, Sims testified that in his July conversation with Coben, concerning the Angenend legal opinion, he told Coben that the legal opinion was more evidence that the earlier "decision" to consolidate "that activity" [Jacksonville] was a solid piece of business strategy. Continuing, Sims supposedly told Coben (5:667):

And I can recall saying that even if we hadn't concluded that relative to the business case, earlier in the year, just the inference that that operation was possibly in violation of the law would give us all of the reasons that we would . . . would need to move to correct that situation.

Yet what move did Ben Sims make to correct the situation? EDS did not produce any memo to Connor or Gibbons (the EDS managers having jurisdiction over Jacksonville) to comply with the Texas Motor Carrier Act (TMCA) or transfer the courier operation to SCI.

The August 18 memo (G.C. Exh. 33) from Perry Burnett and Al Albritton to Harenchar concludes, "If a decision is made to convert . . ." As with the earlier feasibility studies by MTech and SCI, I find the August 18 memo to be simply an updated feasibility study made in connection with an intention by Coben, reflected in his August 3 memo to Sims, to redouble his efforts, now through Harenchar, to acquire part or all of Jacksonville's courier business.

Coben claims that Ben Sims "probably" told him to "get it legal" (6:793, 830) and to submit an "action plan" (6:809–810), which Coben did with his August 3 memo to Sims (6:810). It is not certain that this asserted conference occurred at the same July staff meeting at which Ben Sims inquired about Coben's progress in leveraging. It seems unlikely that the Angenend memo conversation would have come first, (or surely it would have been mentioned at the staff meeting), although the vagueness of the testimony renders any sequence possible. In any event, if it occurred at the July staff meeting then Tim Connor not only was made aware of the matter, but in fact Sims' "get it legal" would be consistent with an interpretation either (1) that Jacksonville should get its courier business in compliance with the TMCA or (2) that SCI-Tyler should assume Jacksonville's courier work. If the Angenend memo conversation occurred privately after the staff meeting, and was to be interpreted as a decision for Jacksonville to turn over its courier business to SCI-Tyler, then corporate protocol logically would have required that Sims notify Tim Connor who in turn would inform Gibbons.

But it was not until mid-September that Gibbons learned of the "decision." Gibbons testified he learned of the transfer decision from Tom Harenchar when Harenchar called to arrange the Las Colinas meeting of September 15 (4:524–525; 5:639–640). Gibbons recalls no conversation in which anyone said that the transfer of Jacksonville's courier operation to SCI-Tyler would cure a perceived violation of the Texas Motor Carrier Act (TMCA) (5:722). Sims testified that he believes in operating in the center of a square (5:668), yet there is no memo in evidence from him to anyone announcing a decision that Jacksonville would be converted either to comply with the TMCA or be transferred to SCI-Tyler. Why

²⁰ "Naturalness is persuasive, artificiality is the contrary." Aristotle, *Rhetoric* III:1:20 (1954, The Modern Library at 167, trans. by W. R. Roberts).

would Sims restrict his announcement to Coben? Coben had no managerial authority over Jacksonville.

The General Counsel contends that EDS is advancing the need-to-comply-with-the-TMCA defense as an afterthought of something it had ignored for months (Br. 42, 52–53). Gibbons concedes that at the October 12 representation hearing, when he was asked the reason EDS decided to close its Jacksonville courier operation, he did not list a possible TMCA violation as a factor (5:574–575).

For all Coben's assurances at the hearing that in (apparently) July Ben Sims said to "get it legal" and to submit an action plan (6:793, 809–810, 830), his repeated pontifications that legality was his own first concern (6:750, 805, 821, 826), his claim that in 1986 he had "blown the whistle" to the Texas regulatory authorities on another firm, Computer Bank, for operating as MTech did (6:795, 818–821), his pious protestations that he would not be part of or participate in an organization if the parent company had an illegal operation (6:751, 821, 826), and his personal requirement that the Jacksonville matter be cleaned up (6:751), what did Coben do? He did solicit the March 14 Angenend letter (6:749)—before the EDS acquisition. Coben does not tell us what he thereafter did with the Angenend letter (other than his claim that he showed it to Ben Sims in July). Gibbons tells us by March 17 memo to Balch (G.C. Exh. 25a), and at the hearing, that Coben sent a copy to Tim Connor whom Gibbons reported to (5:633–634). In turn Gibbons sent a copy to Balch (G.C. Exh. 25a), remarking that he presumed it applied to two competitors, one being Computer Bank in Mt. Pleasant, Texas (5:635),²¹ and another copy by March 22 memo to MTech Staff Attorney Bill Deckalman (5:633). The text of the memo to Attorney Deckalman reads (G.C. Exh. 24):

Attached please find a March 14 letter from Paul Angenend to Marty Coben of Security Courier.

If I am reading this correctly, it seems Paul's view of our Jacksonville courier operation is that we may be operating outside the provisions of the Texas Motor Carrier (Act).

Since this view is somewhat stronger than the position we took approximately two years ago when you, Allan Balch and I met on the same subject, I would like to reassess our present situation.

For instance, if we do need to turn this business over to Security Courier to protect the interest of MTech, what do we do about the in place contracts with these banks? Courier service is an itemized component of the contract and service.

I would appreciate any ideas you might have on this subject.

Whatever ideas Deckalman expressed to Gibbons are not disclosed in the record. If Gibbons or MTech took any action based on Coben's letter or Deckalman's response, that action is not described. So far as any documentary evidence is concerned, the issue became a "dead letter" because of Jacksonville's competitors, such as Computer Bank (operating, as Jacksonville, unregulated and without charging tariff rates),

²¹ One must wonder why Computer Bank's operation could still be a concern in March 1988, as Gibbons testified (5:635–637), if Coben, as he claims, in 1986 reported Computer Bank to the Texas regulatory authorities.

and because of the \$20,000 a month bullet facing Jacksonville if it elected to charge tariff rates.

So far as appears, therefore, Coben did not follow up within MTech. In April EDS made the first part of its acquisition process of MTech. When Ben Sims and Coben had their late April get-acquainted and goal-setting conversation, Coben said nothing about a legal cloud over Jacksonville, nor did Coben follow that meeting by writing of such to Sims. Coben just let it lie until July when, he claims (6:788, 791, 793), he discussed the Angenend letter with Ben Sims.

Believing neither Ben Sims nor Martin V. Coben, I find that they never (before the union activity began) discussed either the Angenend letter, the legal opinion of Attorney Angenend, or the concept of questionable legality of Jacksonville's courier operation. True, it is a logical topic for discussion. Logically, however, Coben would have mentioned it in April when he and Sims discussed goals. If not at that first meeting, then Coben logically would have followed up with a memo to Sims transmitting a copy of the Angenend letter. But we have no memos from Coben or from Sims. And Gibbons, the executive over Jacksonville, admittedly did not learn of the transfer "decision" until mid-September, and then not from Ben Sims to whom he then was reporting. For whatever reason, Coben, I find, did not raise the matter with Sims.

Neither Sims nor Coben testified with anything approaching precision. Sims in particular was given to long-winded generalities and self-serving statements as he carelessly merged events and conversations. Rather than responding directly and succinctly, he would deliver speeches describing in grandiose terms the value of leveraging MTech, and how the same concept applied to SCI—yet he never gave a single example of steps EDS had taken to assist SCI in leveraging SCI anywhere, much less "throughout" EDS. Indeed, Coben tells us it has been, in effect, all up to him with no help from EDS. Sales opportunities, yes, but "door to door" sales opportunities. There is a reason we do not have the balance of Coben's August 3 memo. That reason, I find, is that it would show two things. First, hardly any targeted units beyond Jacksonville, Texas, and, second, other than the fact EDS possibly furnished SCI with a list of names and addresses of its units, a description of how SCI was on its own in attempting to sell its courier services or expertise to those EDS units. Coben tells us as much when he describes, as I mentioned earlier, the lack of leveraging support he has received from EDS. Finally, Ben Sims testified with an unfavorable demeanor, and because of that I do not believe him.

Coben's testimony is likewise marked by an inability to separate conversations, not to mention his habit of placing them in broad timeframes. Vagueness and uncertainty characterize his testimony even on important points. Thus, in their Angenend letter conversation, Sims "probably" told him to "get it legal" (6:793). Later in his testimony Coben rendered Sims's words in firmer fashion, "for sure we want to be legal." (6:830) Coben's vagueness and uncertainty leave me unconvinced, and his self-serving expressions of his requirement of legality ring hollow in light of his inaction after April 19. In any event, his demeanor was unpersuasive at crucial times. I credit only limited parts of his testimony.

(c) *Plans to enlarge the Jacksonville building*

(1) Evidence

A substantial amount of evidence was adduced concerning plans to enlarge the Jacksonville building. Controversy surrounds those plans. There is no dispute that such plans existed. The dispute concerns the stage they had reached and, more important, the significance of the plans in relation to the decision to transfer the courier work and to terminate the Jacksonville couriers.

James Gibbons testified that MTech leased the land at Jacksonville but owned the building, and to his knowledge such condition prevails under EDS (3:435). The need to expand the building dates at least from the time that MTech moved its Tyler operation to the Jacksonville facility. As earlier noted, Gibbons places this event as occurring about August 1987 (3:435; 5:606). Despite Treadwell's recollection of the event as July 1986 (10:1388), with Balch agreeing as to 1986 (7:1147), an April 28, 1987 status report (G.C. Exh. 20), for events that April, from Balch to Gibbons appears to support the 1987 date. A line of the report refers to completing plans "for Tyler to Jacksonville merger for data comm network," and Gibbons explains that such entry refers to the merger that subsequently occurred (5:621-622).

By early 1988, and for most of early 1988 Gibbons testified, expansion discussions became serious (3:463; 5:610; G.C. Exh. 20). The business had grown and that plus the arrival of the Tyler group had caused the building to be overcrowded (4:505-506; 5:608-612). Gibbons testified that by early summer 1988 Balch, and possibly Don Woods, had showed him some preliminary drawings for the expansion. Gibbons said any expansion would have to be made a budget item (3:465-466). At some point after EDS took over on July 1, Gibbons testified, Don Woods had two contractors come to the site for an inspection in conjunction with possible bids by the contractors. No decision had been made to proceed because there had been no approval of any capital expenditure (3:467-468; 5:615).

Balch testified he assigned Don Woods to begin the drawings (7:1148). As earlier noted, when Woods received responsibility for the courier department in late August 1988, Treadwell testified, Woods never became much involved with that department because he spent so much time on the building expansion plans (10:1387-1389).

Gibbons testified that he reported to Ben Sims, on an interim basis, from about September 1 to mid to late October 1988 (5:578). Beginning about late October or early November he then reported for a short time (perhaps only a few days) to Randy Fluitt when Ben Sims made an organizational realignment (4:496; 5:613). During the short time he reported to Fluitt, Gibbons discussed with Fluitt the expansion plans for Jacksonville. In late October [thus, after the October 11 terminations], Gibbons testified, Woods took his drawings to a Jacksonville firm which (professionally) prepared an expanded version on larger sheets of paper.²² It was this expanded version that Gibbons presented to Fluitt. Explaining to Gibbons that EDS has a real estate group which evaluates

such matters, Fluitt advised Gibbons to contact that group (5:605,613-614).

Gibbons notified Balch about the EDS procedure of going through the real estate group (5:614; 7:1150). Representatives of the EDS real estate group first contacted the Jacksonville people, and possibly then visited the facility, in late November to early December (5:605). Gibbons testified that he has not had personal contact with the real estate group because, apparently under the EDS procedure, the group's contact is directly with Jacksonville (3:469). Even so, Gibbons understands that the real estate group has completed its survey and, apparently, has determined that expansion rather than relocation is the better choice (5:615). Gibbons is a bit uncertain as to this, first testifying that the question of expansion or renovation is still being considered and then, after saying the real estate group had selected expansion as the wiser choice, testified that the group has contacted "some potential contractors to try to determine the cost of the facility expansion, et cetera." (5:614-615.) His uncertainty no doubt reflects the fact his information comes from his Jacksonville contacts rather than direct from the real estate group. Balch, who testified later, does not say, and Treadwell, the last witness, simply says that expansion discussions continue (10:1365).

The drivers are specific that about 2 weeks before their termination, or about late September, Don Woods posted a blueprint of the expanded facility. Woods said they were the plans, or proposed plans, for expanding the building, and he solicited their comments (1:106-107, 119-126, Nock; 2:268, 297, Stanwood). As Chandler explained to the drivers, the blueprint included expanded break areas (smokers and non-smokers) for the drivers and a private office for Chandler (1:106, 125; 2:191, 228-229,382). The blueprint was still posted on the Friday before the drivers were terminated (2:268, 383, 400). When terminated driver Martha Lance returned her uniforms and picked up her check on October 15, the blueprint was still posted (2:193).

The record does not contain a copy of either the blueprint that Don Woods posted or the one, purportedly expanded, which Gibbons submitted to Randy Fluitt around late October or early November. EDS did not call Woods to testify. Included in the record is a sketch (R. Exh. 5) Stanwood made November 17 from memory based on the drawing Chandler displayed about 2 days before the Woods blueprint was posted. Chandler told Stanwood that the drawing he had was to be used for the blueprint (2:294, 296-298). When Respondent showed Stanwood a different document (R. Exh. 6) at the hearing, Stanwood testified it has a substantially different configuration and was neither the one Chandler had showed him or the one Woods posted (2:299, 301).

Notwithstanding Stanwood's specific rejection of Respondent's Exhibit 6 (not offered or received in evidence), and Gibbons' own apparent lack of personal knowledge, Gibbons undertook to testify that Respondent's Exhibit 6 is one of two copies of the "on-site" (posted) document, that it shows no specific area designated as "couriers," although it does show one for "Dispatch." (2:469-471) Actually, Stanwood's sketch (R. Exh. 5) does not contain an area designated as "Couriers" or even "Dispatch." Clarification came from the statements Woods and Chandler made to the drivers explaining how Chandler and the couriers would enjoy more space in the blueprint of the building enlargement.

²²On his first day of testimony a month earlier, Gibbons said that he had not seen any plans—just working plans drawn by staff members in Jacksonville (3:464).

Around the posting timeframe, Woods said he was going to get some bids (2:267–268), and two different contractors visited the facility (1:107). Chandler told driver Charles Samples on one of these occasions that the contractor was there to make a bid (2:382–383). Balch confirms the number (7:1150) as does Gibbons, although Gibbons suggests an earlier timeframe and adds that no approval for actual contracting had been given (5:615). Asked by Respondent's counsel to what extent the decision as to expansion or remodeling was involved in Respondent's consideration of whether Jacksonville was going to continue its courier operation, Gibbons answered [hesitation in original], "None . . . almost none certainly." (5:614.)

The drivers testified persuasively. The demeanor of each was favorable, and I credit them. Gibbons, Balch, and Treadwell testified unconvincingly, and each displayed an unfavorable demeanor. On disputed points, I credit the drivers, and I disbelieve Gibbons, Balch, and Treadwell. I do not discredit Gibbons respecting his taking expansion plans to Fluitt in late October or early November. Even without the couriers, the Jacksonville facility apparently was overcrowded. The intended use of the expanded space, however, is a different matter.

(2) Discussion

I have found that as of late September, and into October, Respondent had posted a blueprint plan which included (by expressed intention if not on paper) expansion of the courier area, with Chandler to have his own office. Analysis by the parties in the briefs is rather abbreviated. Respondent dismisses the subject as preliminary plans (Br. 23). The General Counsel, after describing the basic facts (Br. 11), rhetorically asks why plans were underway to expand the driver areas if EDS knew the in-house courier function was shortly to be eliminated (Br. 40), and concludes by saying the blueprint facts belie Respondent's claim that the transfer decision had "already" been made (that is, before the notice of union activity) (Br. 51).

Elsewhere the General Counsel argues (Br. 49) it was at the "emergency" meetings in September when the actual Jacksonville decision was made, and it was made to thwart the union campaign. If that is so, the decision could have been at the meeting of September 22 when Ben Sims presided. The week of October 3, Gibbons testified, several management meetings took place (4:534, 536). As I summarized earlier, Respondent decided not to inform the Jacksonville couriers until the day of their termination. Albritton was called on Thursday, October 6, to return from vacation (6:876, 881, Albritton; 7:1029, Harenchar). Despite all the evidence and writing about this topic, its significance remains ambiguous. Testimony by Woods would have clarified the situation. I draw the inference from Respondent's failure to call Don Woods that his testimony would have been adverse to EDS.

(d) *Conclusions as to motive*

The credited findings show that EDS management was well informed of the union organizing at Jacksonville almost as soon as it began. Although the local managers at Jacksonville made no remarks to the drivers, Chandler and Statutory Agents Alexander and Dennis made statements which reflect

the thinking of EDS. That thinking was hostile toward any unionizing. Darlene Alexander's comments reflect, as I have found, not only her personal opinion but also management's, and the hostile opinion of management focused early on jobs. Before September was out, Supervisor Chandler made his coercive remark to drivers Charles Samples and Walter Paul Stanwood, that they had "better walk light" because SCI was trying to get their jobs. Chandler's threat doubtlessly is based on comments he heard from management—that the work should be subcontracted to SCI-Tyler in order for EDS to keep its courier business union free.

Although none of the known UAW supporters were fired before the mass termination on October 11 (one day before the representation hearing in Case 16–RC–9078), there was no need to do so in late September or early October when the EDS plan was to terminate the whole group on October 11. In the meantime, Ken Dennis' warning to Bonnie Barnes, that Stanwood would be fired if he did not cease talking about the Union, was an accurate gauge of Respondent's hostility toward the UAW's leading adherent.

Respondent's animosity, generally held in check while the senior management and executives at EDS devised a plan, slipped in late September when the local management at Jacksonville eliminated the extra 15 minutes of paid time each day and issued a warning to Stanwood in violation of Section 8(a)(3) and (1) of the Act. The September 14 fingerprinting warning by Darlene Alexander in the breakroom to Stanwood and others bears repeating: "Just watch and you'll all be sorry."

The first hint of how true Alexander's warning, in reality a revelation of EDS's felt hostility, would be is manifested in the formal warning imposed on Walter Paul Stanwood in late September. Alexander's prophecy of doom was displayed in its full bitterness less than a month later when EDS terminated the drivers. Adding insult to injury, EDS allowed SCI representatives to be present at the announcement. Rubbing salt in the just-inflicted wounds of the couriers, EDS told the terminated drivers that the courier business they did before that morning was now being contracted to SCI—the same SCI whose representatives were standing there in the room.

I find that EDS did not make a decision before the union activities at Jacksonville that SCI should take over Jacksonville's courier business. The incidents of unlawful conduct in September assist in showing that the true motive EDS had in transferring Jacksonville's courier work to SCI-Tyler was to escape from the UAW. I so find.

Earlier I discussed my reasons for not believing D. Benjamin Sims or Martin Coben. Similarly, I credit neither Harenchar nor Gibbons in their testimony. Both testified with an unfavorable demeanor. The takeover decision they describe did not occur until after the union activities began at Jacksonville. SCI's activity before that was in conjunction with SCI's revitalized focus on Jacksonville as a sales target. For that purpose SCI had launched a new and expanded feasibility study. For this feasibility study it used Albritton and Joseph A. Gipson, among others. Before EDS learned of the UAW activities at Jacksonville, however, all of SCI's efforts were geared toward developing a convincing case for winning the Jacksonville courier work at some future staff meeting with D. Benjamin Sims. With notice of the UAW activities at Jacksonville, Sims simply seized on SCI's current fea-

sibility work as convenient proof that a decision had been made much earlier for SCI-Tyler to take over the Jacksonville courier work.

6. Conclusions as to alter egos

Although not alter egos in the usual manner in which a new company is created to shelter the business of the old, the situation here nevertheless yields the same result as an alter ego relationship. Ben Sims of EDS exercised the control that absolute ownership of both MTech and SCI gave EDS. Ben Sims manipulated the corporate details to serve the interests of EDS. That means a \$240,000 annual loss for Jacksonville. The corporate shell game is useful, however, because it moved the courier operation 27 miles north. It takes no imagination to realize that the additional commuting mileage for the drivers (assuming they could get hired at SCI) would likely deter most from seeking employment at SCI in Tyler. To the extent EDS gambled on that, it won.

If I were to decide the point, I would find that EDS and SCI are alter egos—as to the Jacksonville courier matter. Some of the traditional criteria do not fit, but that matter of form should not blind anyone to the reality of the corporate shell game EDS has used in attempting to defraud the Jacksonville couriers of their statutory rights. Nevertheless, I do not reach the decision point. As I discuss shortly respecting alter egos and principal actors, an alter ego finding is unnecessary when a corporate parent is a principal actor. It is clear that EDS acted in this case as a principal actor. Its liability is direct rather than derived from an alter ego concept.

H. Analysis and Overall Conclusions

1. The subcontracting and terminations

As the parties recognize in their briefs, the transfer of the courier work at EDS-Jacksonville to EDS/SCI-Tyler is based on a subcontract from the former to the latter. The General Counsel describes the subcontracting as a convenient “device” by which EDS, exercising its complete ownership and control of both Jacksonville and SCI-Tyler, simply moved the courier work from Jacksonville to Tyler in order to escape the UAW (Br. 37).

To Respondent, the contracting arrangement is a standard business agreement and valid because it was done simply to implement a decision Ben Sims made before the union activities began at Jacksonville (Br. 20, 37–38, 78–81). The thrust of Respondent’s argument is that although the implementation of its earlier decision came shortly after learning of the union activity, the fact of that union activity was simply coincidental and had nothing to do with the subcontracting which followed. As the General Counsel puts it in characterizing the coincidence argument, the timing was “just bad Karma.” (Br. 45.) As already discussed, rejecting as false Respondent’s contention that it earlier had decided to subcontract the work, I have found that EDS did not make the decision to transfer (subcontract) the courier work from Jacksonville to SCI-Tyler until after it learned of the UAW activity at Jacksonville, and that a motivating reason for subcontracting the work and terminating the drivers was to escape the UAW. Thus, subcontracting was the device chosen

to be the deception for masking Respondent’s unlawful motive.²³

The next question is whether EDS carried its burden of showing that it would have subcontracted the work (and terminated the drivers) in any event. The desire to subcontract, whether by MTech or by EDS, always ran up against the \$20,000 a month bullet. At the July staff meeting, I have found, Martin Coben mentioned Jacksonville as one of his sales targets. There was no decision there by Ben Sims that SCI take over Jacksonville’s courier business. Coben proceeded on the basis of a sales approach, assigning Harenchar the task. Harenchar, I have found, commissioned Perry Burnett and Al Albritton to do a feasibility study.

The August 18 feasibility study by Burnett and Albritton arrived at a very busy time for Harenchar. Before Harenchar could act on it by negotiating with Gibbons and Jacksonville’s Allan Balch, the UAW activities began. The decision which followed was based on the UAW activities. EDS never demonstrated, certainly not by any credible evidence, that it would have reached the same decision by somehow overcoming the \$20,000 bullet.

Ben Sims did testify that the question of legality, reflected by the March 14 Angenend letter, would have been sufficient by itself to have persuaded him to order the transfer because he believes in operating lawfully (5:668, 707). As already described, the demeanor of Sims was unfavorable. I do not believe him. Also, I have found that Sims and Coben did not discuss the Angenend letter in July. There is no credible evidence they ever did before the September notice of union activities.

Gibbons testified at the October 12 representation hearing. He there was asked the reason for the closing of the Jacksonville courier operation. Gibbons concedes here (5:574–575) that in responding to that question at the October 12 representation hearing he did not list, as a factor for the decision to close the Jacksonville courier operation, a possible violation of the Texas Motor Carrier Act (TMCA). So far as appears in the record, the Angenend letter, and the legality question, simply lay dormant until this hearing when (first in response to a question I asked, 4:516–517) Gibbons mentioned the Angenend letter and then identified it (5:572, 602). Thus, the Angenend letter, which had lain dormant for several months, was not raised as an issue until this hearing.

I therefore find that EDS has failed to show that it would have subcontracted Jacksonville’s courier work and terminated the drivers in any event. The economics of subcontracting, tied to resolution of the \$20,000 bullet, is not separated in this record from the taint of Respondent’s motive to retaliate against its Jacksonville drivers for becoming active for the UAW. Accordingly, I find that, as alleged, Respondent EDS violated Section 8(a)(3) and (1) of the Act on October 11, 1988, when it (1) terminated its Jacksonville, Texas courier drivers and (2) subcontracted their work to the Tyler, Texas office of its wholly owned subsidiary, SCI. I discuss the appropriate remedial order—restoration and reinstatement—in the Remedy section of this decision.

²³ “All warfare is based on deception.” Sun Tzu, *The Art of War* at 66, Chap. 1, No. 17 (1963, Oxford Univ. Press, trans. by S. B. Griffith).

2. The constructive refusal to hire

The authority the General Counsel cites for the constructive refusal to hire allegation is the constructive discharge case of *Industrial Supply Co.*, 289 NLRB 639 (1988). The General Counsel does not convert the test in constructive discharge cases into language to be applied here. Apparently, however, it would read something as follows. Respondent, as alter egos EDS and SCI, offered a job opportunity under such adverse conditions as to support the conclusion that (1) the burdens imposed on the terminated employees would cause, and were intended to cause, working conditions so difficult or unpleasant as to prevent the terminated employees from applying at SCI-Tyler, or if they applied and were hired, such employees soon would resign, and (2) the burdens were imposed because of the employees' union activities.

Taking first items first, let us consider the burdens. Certainly the extra commuting distance is a burden. As the record does not give the residence location of all the Jacksonville drivers, although showing that at least one lives south of Jacksonville and another east, I shall assume a random scattering around Jacksonville. With that scattering fixing the center of Jacksonville as the average center point of residence, I shall count the 27-mile distance from Jacksonville to Tyler as the average extra commuting distance for each driver. Assuming a 45-mile-per-hour average driving speed over the 27-mile distance, from start up to slow down (and assuming some traffic), the extra one-way commuting time would be approximately 36 minutes. Double that and the extra daily commuting time would be 1 hour 12 minutes.

Using the IRS standard mileage rate of 24 cents for tax year 1988 (IRS publication 17 at 101, rev. Nov. 1988), and we see that the additional commuting cost imposed by having to commute the 54-miles roundtrip to Tyler would be \$12.96 a day or \$64.80 per week—which, using standard IRS practice—I round up to a weekly figure of \$65.

The paycheck stub (G.C. Exh. 14) of Charles Samples reflects that, in his brief tenure at SCI-Tyler, he was paid a total of \$245.93 for the week beginning October 27, 1988. Regular pay is shown as \$213.85 and overtime pay at \$32.08. In an unmarked column the figure of 45.50 is shown, presumably for hours. Although the General Counsel asserts that the stub reflects an hourly rate of \$4.55 I am unable to deduce that figure (unless it derives from the 45.50), and the record does not otherwise show his hourly pay rate. Various computations do not yield a perfect solution because I cannot reconcile the overtime pay. (\$213.85 divided by \$4.55 gives 47 hours; divided by 45.50 hours it yields \$4.70 per hour. However, applying a premium rate of either \$2.275 or \$2.35 for 7 hours or 5.5 hours produces less than one half the \$32.08.) Recall that Bonnie Barnes was to be paid an hourly rate of \$4.70 at Tyler (2:344). As \$4.70 appears to be roughly correct, I shall use that figure. Thus, for a regular 40-hour week (which apparently would be the normal average) Samples would have gross weekly pay of \$188. SCI applied a total tax rate (for Federal income withholding and FICA) of only 15.35 percent. Applying that percentage to the \$188, the tax deductions would total \$28.86, leaving a net weekly check of \$159.14. From that weekly check of \$159 would have to be deducted the extra commuting cost of \$65, leaving, for a 40-hour week, a true net check of a mere \$94.

Comparing Samples' pay at Tyler with his earnings at Jacksonville is difficult because the record is even less clear about his pay rate at Jacksonville. Samples' paycheck stubs from Jacksonville show regular gross pay of \$404.84, but on a semi-monthly basis (G.C. Exhs. 13a, b). Harenchar testified that Jacksonville employees are paid an hourly rate semi-monthly (7:959, 1033, 1061). Doubled to a monthly \$809.68, multiplied to an annual, then divided, Samples' hourly rate at Jacksonville calculates to be \$4.67. That is close to the \$4.62 rate Bonnie G. Barnes was earning (2:344). Samples, at 3 years 4 months, had worked a few months longer than Barnes who was just short of 3 years (2:320, 364).²⁴ At Jacksonville, however, payroll taxes were deducted from Samples' pay at a rate of 17.9 percent (G.C. Exh. 13a).

Using a 40-hour week at Jacksonville of \$4.67 per hour produces a figure of \$186.80. Less taxes (Federal income withholding and FICA) at 17.9 percent leaves a net 40-hour check of \$153.36. Rounded to \$153, that 40-hour net pay at Jacksonville would be \$59 more than the after-commuting net of \$94 at Jacksonville. Stated differently, the net weekly loss of \$59 corresponds to a net weekly pay cut for Samples of 39.0 percent! The General Counsel argues that Respondent, by transferring these jobs from Jacksonville to Tyler, succeeded in reducing the couriers' earnings so much that it would have been impractical for them to work at SCI-Tyler (Br. 55).

Other burdens were added for the Jacksonville drivers when they had to apply as new hires at SCI-Tyler. They had to undergo physicals, polygraphs (subsequently eliminated), and background checks. Compared to Jacksonville's past hiring standards, SCI-Tyler's are stringent. Although Samples, wearing his UAW cap, was hired by SCI, Bonnie Barnes experienced coercive interrogation by Leaver Jo Bailey. Less circumspect that Nelson, Bailey revealed the underlying attitude at Tyler: SCI did not want a union at Tyler.

In short, the burdens imposed on the terminated drivers were physically unpleasant (over an hour's additional driving time each day), personally demeaning (apply as new hires and submit to polygraphs and background investigations), and economically devastating (with the extra commuting cost, a reduction in 40-hour net pay of some 39 percent)—all in an environment suggesting that union supporters were unwelcome at Tyler.

I find that the burdens imposed meet the objective standard of abuse. Did EDS and SCI intend that the extra burdens keep the Jacksonville drivers from working at Tyler? Perhaps not as far as applying is concerned because SCI applications were offered to the drivers at their exit interviews. No one burden demonstrates the intent; it is the cumulative effect of everything. Moreover, EDS's antiunion animus demonstrates that its motive was to eliminate the union threat at Jacksonville. This animus extended to the corporate level because, I have found, it is what motivated Ben Sims to decide that the courier operation should be subcontracted to SCI-Tyler.

The corporate animus did not disappear once the work was subcontracted. Subcontracting the work to Tyler would solve the immediate union problem at Jacksonville, but it also

²⁴ According to the Burnett/Albritton feasibility memo of August 18, average employment time of EDS couriers was 2.5 years with average hourly pay of \$4.41 compared to SCI's \$5.45 (G.C. Exh. 33). The memo appears to compare Jacksonville figures with those of Tyler.

would export a potential future problem to Tyler if a substantial number of the Jacksonville drivers went to work at Tyler. I infer that, at the September 22 meeting, Sims, Coben, and the others concluded that the additional commuting time and expense would likely deter a significant number of the drivers from completing the application process, and that those two factors probably would quickly discourage any union supporter who was hired from enduring the commuting hassle for very long. Certainly the odds would seem to support the (inferred) conclusion of Sims, Coben, and the others.

Nevertheless, did SCI (or EDS through SCI) discriminate against the terminated drivers? The complaint alleges two unlawful acts by SCI: (1) requiring the terminated drivers to file applications as new employees, and (2) constructively refusing to employ the terminated drivers. Findings of unlawful motive must bear on the allegations.

The General Counsel alleges (complaint par. 16) that SCI violated Section 8(a)(1) and (3) of the Act by requiring the terminated drivers to file applications as new employees to be considered for employment for SCI. That is, the application requirement is alleged as an independent violation rather than as further evidence of a constructive refusal to hire.

The General Counsel's evidence is insufficient to support an independent violation respecting the application requirement. SCI is a legitimate subsidiary and a certificated motor carrier. Even before the union activity SCI's Richard Rozzell, in February 1988, informed Jacksonville's Allan Balch that any Jacksonville drivers hired by SCI (should SCI take over Jacksonville's courier work) "must go through our complete processing for a new hire." (G.C. Exh. 28 at 1.) Thus, SCI's application process not only predates the UAW activity at Jacksonville, but MTech was told that Jacksonville drivers seeking employment at SCI, in a takeover by SCI, would have to apply as new hires.

The General Counsel's proposed order, at 1(n), would direct Respondent to cease requiring the terminated couriers to file applications as new employees to be considered for employment. The Government does not seek an order directing SCI to cease requiring applications as new employees in all subcontracting situations. At least, I do not read the complaint allegations or the General Counsel's position to attack SCI's normal procedure. As I understand the General Counsel's allegations and position, the Government alleges and argues that Respondent EDS and Respondent SCI, as alter egos, used SCI's stringent hiring procedures, including the requirement of a new application, as convenient obstacles to keep the Jacksonville union supporters from pursuing employment at SCI. EDS and SCI made the applications available at the exit interviews. Even so, application was as a new employee. Objectively, that would be discouraging to a Jacksonville driver. I find that EDS's motive was based on its union animus. But there must be more than an unlawful motive; there must be discriminatory conduct. Two discriminatory acts are alleged: (1) SCI required drivers to apply as new employees and (2) SCI constructively (not actually) refused to hire the terminated drivers.

For affirmative remedial relief the General Counsel seeks only restoration and reinstatement at Jacksonville. The General Counsel seeks no order that the Jacksonville drivers be transferred to SCI-Tyler rather than hired there. The focus of the General Counsel is on restoration at Jacksonville—not hiring the Jacksonville drivers at Tyler. Even if all the Jack-

sonville drivers had been transferred to Tyler, they still would have been faced with the problem of commuting each day—with the inherent disincentive to continue the commuting for very long. Thus, the remedy the General Counsel seeks as to the Tyler allegations are negative only—cease and desist. No affirmative relief is sought for the constructive refusal to hire allegation. SCI did not discriminate against the drivers under any constructive refusal to hire theory, and there is no allegation that SCI in fact refused to hire any of the terminated drivers. I therefore shall dismiss complaint paragraph 17—the constructive refusal to hire allegation. As SCI would have required new applications in any event, I shall dismiss complaint paragraph 16.

3. Alter egos and principal actors

Does the alter ego theory add to the Government's case against EDS for subcontracting its Jacksonville courier work and terminating the Jacksonville couriers? The same result obtains even if SCI is seen as nothing more than the wholly owned subsidiary it is. If EDS were defending on the basis that MTech operates independently (at Jacksonville and elsewhere) as a wholly owned subsidiary of EDS, then perhaps the alter ego allegation would be significant.²⁵ Here the evidence shows that, for all practical purposes, MTech has been folded into EDS. Thus, EDS itself is the principal actor. In this case the corporate executive who made the critical command decision was EDS Division Vice President D. Benjamin Sims. The action for which the Government seeks an affirmative remedy was conduct done and decision made by EDS itself—not by any alter ego subsidiary. In such circumstances, an alter ego or single employer allegation or finding is unnecessary. See *Storer Communications*, 297 NLRB 296, 300 fn. 30 (1989); *Swift Independent Corp.*, 289 NLRB 423, 429–430 fns. 12 and 21 (1988), remanded on other points as *Esmark, Inc. v. NLRB*, supra, 132 NLRB 2710 (1961).

On September 22, D. Benjamin Sims took control and made the critical decisions. These decisions, I have found, were (1) to subcontract the Jacksonville courier work to SCI and (2) to discharge the Jacksonville couriers, all because the Jacksonville couriers became active for the UAW. These facts, I find, filtered down to the supervisors such as Leaver Jo Bailey at Tyler. Bailey's coercive interrogation of any remarks to job applicant Bonnie G. Barnes in Tyler were therefore a direct result of the decisions made by EDS. However, aside from the General Counsel's alter ego allegation, it is not clear that the General Counsel has alleged that EDS is equally responsible with SCI for Bailey's conduct. Complaint paragraph 9 simply alleges that SCI, acting through Bailey, engaged in the conduct. The conclusory paragraphs do not clarify the situation. Accordingly, I do not find that EDS (in addition to SCI) has committed unfair labor practices based on Bailey's remarks.

4. Prima facie cases and "whatever source"

Citing *Bali Blinds Midwest*, 292 NLRB 243, fn. 2 (1989), Respondent asserts that, in evaluating whether the General Counsel has presented a prima facie case, "the ALJ must view" the General Counsel's evidence "in isolation, apart

²⁵ See *Esmark, Inc. v. NLRB*, 887 F.2d 739 (7th Cir. 1989), remanding 289 NLRB 423 (1988).

from a Respondent's defense." (Br. 73.) The *Bali Blinds* line of cases begins with *Hillside Bus Corp.*, 262 NLRB 1254 (1982).

Calling all but three of the witnesses in this case, the General Counsel rested near the beginning of the ninth day (9:1252). Respondent then proceeded with its case and called Leaver Jo Bailey, Joseph A. Gipson, and Tommy D. Treadwell before resting (10:1390). No rebuttal was offered. I need not pause to consider whether any of my findings of a prima facie case by the Government rest on evidence adduced after the General Counsel rested, for, as I read *Golden Flake Snack Foods*, 297 NLRB 594, 595 fn. 2 (1990), the Board, sub silentio, has overruled the *Hillside Bus* line of cases. Regarding this point, the Board stated (emphasis added) in *Golden Flake*, "it is the evidence as presented at the hearing, drawn from whatever source, which precisely determines whether or not there is a prima facie case of unlawful conduct." The Board's *Golden Flake* rule is consistent with *Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 103 S.Ct. 1478, 31 FEP Cases 609 (1983). See *Red Arrow Freight Lines*, 289 NLRB 227 (1988).

5. No weight given to outside the record references

Counsel made certain statements in their briefs without benefit of citations to the record. Some of these statements are not based on record evidence, and I give no weight to them. One appears in the Respondent's brief and several in the General Counsel's. Addressing the issue of whether the dispatchers are supervisors, Respondent asserts (Br. 52 fn. 8), "Respondent has a policy of not calling rank and file employees as witnesses inasmuch as such employees are not management." As there is no record evidence of such a "policy," I attach no weight to the assertion.

The General Counsel's more prominent statements having no support in the record include references (1) that no additional documentation about the Jacksonville courier work was provided pursuant to subpoena requests (Br. 5); and (2) that before the unfair labor practice hearing Respondent EDS and SCI never argued to NLRB Region 16, either during the investigation of the charge or in defense to the request for 10(j) relief, that a possible or perceived violation of the Texas Motor Carrier Act was a basis for the transfer of the Jacksonville courier business to SCI (Br. 11-12, 42); and (3) that at the October 12 representation hearing Respondent's attorney George Cherpelis and (witness) James Gibbons took the position that the work was transferred to Tyler for economic reasons (Br. 11-12, 42). I attach no weight to these statements because they are not supported by record evidence.

The General Counsel's actual assertion regarding the TMCA defense is: "Nor was such raised by Respondents before the Board in their defense to the request for injunctive relief pursuant to Section 10(j) of the Act." (Br. 12.) Ostensibly that reference is not to the documents filed with the Federal district court by the Respondents in the 10(j) proceeding. Even so, it raises a point which requires summary.

In unfair labor practice proceedings the charges, pleadings, motions, and orders, commonly referred to as the "formal papers," are introduced as the General Counsel's first exhibit, with appropriate alphabetical suffixes for each document. For some reason the General Counsel included in the formal papers copies of the documents the General Counsel

filed in the 10(j) proceeding. These documents include the Government's petition and brief (G.C. Exhs. 1n, o). Before me the Respondent objected to the inclusion of the 10(j) documents with the formal papers as irrelevant and prejudicial. Although agreeing they should not have been part of the formal papers, even though frequently they are received in cases as other exhibits, I declined to delay the hearing so that they could be removed and the remaining items renumbered. I invited Respondent to file copies of any corresponding documents it filed in the 10(j) proceeding (1:8-10).

Respondent again objected, without success, to the introduction of the documents when the General Counsel announced the case number assigned by the court clerk. (2:197-198). There are two other references to the 10(j) proceeding. One did not prompt further objection (3:407-409), and the other involved a question of James Gibbons from the General Counsel concerning his knowledge of the documents assembled for the 10(j) proceeding or his awareness of a certain point in Respondent's 10(j) brief (5:600-601). Respondent did not elect to offer any of the documents it filed in the 10(j) proceeding before the Federal district court. Although the 10(j) documents should have been offered, if at all, as ordinary exhibits rather than as part of the "formal" documents, Respondent has not been prejudiced by their inclusion in the record because it had the opportunity (not taken) to submit copies of its own 10(j) pleadings. Moreover, as the General Counsel's 10(j) petition and briefs would contain only allegations and assertions by the Government, and not admissions by the Respondent, they are not evidence. Accordingly, I have given no weight to anything contained in the 10(j) papers.

CONCLUSIONS OF LAW

1. EDS and SCI each is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The UAW is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material EDS dispatchers Darlene Alexander, Ken Dennis, and Mort Oliver were agents of Respondent EDS acting on its behalf within the meaning of Section 2(13) of the Act.

4. At all material times SCI Field Supervisor Leaver Jo Bailey was an agent of Respondent SCI, acting on its behalf, within the meaning of Section 2(13) of the Act.

5. The October 11, 1988 oral arrangement between EDS and its wholly owned subsidiary SCI is a sham subcontract devised for the purpose of escaping the UAW's organizing activity at Jacksonville by terminating the Jacksonville drivers and transferring Jacksonville's courier work to SCI at Tyler.

6. Respondent EDS violated Section 8(a)(1) of the Act by the following conduct:

(a) On September 14, 1988, when dispatcher Darlene Alexander threatened employees with job loss and plant closure because of their union activities, and coercively interrogated employees.

(b) In September 1988 when courier supervisor Robert Chandler coercively interrogated an employee and threatened employees with changes in employment and loss of jobs if they did not cease their union activities.

(c) In September 1988 when dispatcher Ken Dennis threatened an employee with discharge if he did not cease talking in support of the Union.

7. Respondent SCI violated Section 8(a)(1) of the Act by the following conduct of Supervisor Leaver Jo Bailey about October 24, 1988:

(a) Informing a terminated Jacksonville driver that the Jacksonville drivers had lost their jobs and not been permitted to transfer from EDS to SCI because of the Union.

(b) Coercively interrogating an employee.

(c) Telling an employee that SCI did not want the Union at Tyler.

8. Respondent EDS violated Section 8(a)(3) and (1) of the Act by the following conduct:

(a) Issuing a formal written warning on September 21, 1988, to Walter Paul Stanwood Jr.

(b) About September 26, 1988, revoking its prior existing policy of allowing employees to earn 15 minutes of extra paid work time each day.

(c) On October 11, 1988, subcontracting its Jacksonville courier work to SCI-Tyler.

(d) On October 11, 1988, terminating its Jacksonville courier drivers, including the following 15 named drivers:

Bonnie G. Barnes	Larry Reagan
Queen E. Chumbley	Walter P. Stanwood Jr.
Margaret Hendricks	Nila Scully
Martha J. Lance	Daniel R. Schultz
James C. Mell	Charles Samples
Ray Myrick	Clayton White
A. L. McDaniel	Kenneth Wheeler
Shawn D. Nock	

9. Respondent EDS did not violate Section 8(a)(1) of the Act as alleged in complaint paragraphs 9(a)(1) and (b)(1), nor did it violate Section 8(a)(3) and (1) of the Act as alleged in complaint paragraphs 10 and 12.

10. Respondent SCI did not violate Section 8(a)(3) and (1) of the Act as alleged in complaint paragraphs 16 and 17.

11. The unfair labor practices found affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The General Counsel seeks an order that EDS reestablish its Jacksonville courier operation, offer immediate reinstatement to the terminated drivers, and make the drivers whole (Br. 57, 58). Citing *Lear Siegler, Inc.*, 295 NLRB 857 (1989), the General Counsel contends that such an order would not be "unduly burdensome." In *Lear Siegler* the Board announced that henceforth it would apply the "unduly burdensome" standard in determining whether restoration is the appropriate remedy. It is a respondent's burden to show that restoration of the status quo ante is inappropriate. *Lear Siegler*, supra at 860.

Respondent did not carry its burden. It does not appear that restoration and reinstatement would be "unduly burdensome." EDS still owns and operates the Jacksonville facility, and Jacksonville retained its customers. EDS simply leased

(for \$10) Jacksonville's vehicles to SCI in conjunction with subcontracting the courier delivery work to SCI-Tyler. Although SCI apparently has disposed of some of the older vehicles, EDS can simply direct SCI to return the remaining vehicles to Jacksonville plus the additional vehicles SCI has acquired to cover Jacksonville's routes. As all of the money is corporate anyhow ("It's all my money"), EDS can reimburse SCI, by accounting offsets, for any vehicles SCI has purchased and would have to turn over to Jacksonville under this order. EDS must revoke its sham oral subcontracting arrangement with SCI. SCI participated in the unlawful subcontracting scheme as a wholly owned subsidiary dominated, in this matter, by EDS. Accordingly, I shall include both entities in a single order.

Because the subcontracting arrangement here was unlawfully motivated, I shall order EDS to revoke it. EDS having failed to show that restoring its courier service at Jacksonville, Texas, would be unduly burdensome, I shall order EDS to make that restoration. *Lear Siegler*, id.; *Universidad Interamericana*, 268 NLRB 1171 (1984).

I do have one concern, and that is the matter of whether restoration would put the Board in the position of ordering an operation restored which conflicts with the Texas Motor Carrier Act (TMCA). I therefore shall order that, to the extent a restored operation must comply with TMCA, EDS take all steps necessary to effect that compliance. Does that, in turn, reopen the economics aspect? May EDS, at the compliance stage, assert that before Jacksonville would have come into compliance with TMCA it would have subcontracted all the courier work to SCI? That would give EDS a second bite at the apple. EDS had its chance to offer its best evidence and presumably did so. It may not relitigate the matter at the compliance stage. However, there may be posthearing developments that should be considered on the restoration remedy, including the matter of compliance with TMCA. Accordingly, I shall permit the parties to introduce at the compliance stage evidence which may be relevant to the appropriateness of the restoration and reinstatement portions of the remedy, "provided of course that such evidence was not available prior to the unfair labor practice hearing." *Lear Siegler*, supra at 861-862.

EDS must also offer all the courier drivers it terminated on October 11, 1988, at its Jacksonville, Texas unit immediate and full reinstatement to their former jobs in the restored courier operation, discharging, if necessary, any others hired into and holding those jobs in the transferred operation, or, if such jobs no longer exist in the restored operation, to substantially equivalent jobs, without prejudice to their seniority or any other rights or privileges previously enjoyed. EDS also must make whole the terminated drivers for any loss of earnings and other benefits suffered as a result of the discrimination against them. Identity and addresses of all the EDS couriers terminated on October 11, 1988, are among the details that may be determined at the compliance stage. Backpay shall be computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as established in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as calculated in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue²⁶ the following recommended²⁷

ORDER

A. The Respondent, Electronic Data Systems Corporation, Jacksonville, Tyler, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating any employee about union support or union activities.

(b) Threatening any employee with discharge or other discipline, unfavorable changes in working conditions, office closure, or other discrimination because the employee or other employees support the UAW or any other union.

(c) Issuing formal written warnings to Jacksonville, Texas employees in retaliation for their union activities.

(d) Discriminating against employees at Jacksonville or elsewhere by reducing their paid working time by 15 minutes because they support the UAW or any other union.

(e) Discharging or otherwise discriminating against its Jacksonville, Texas courier drivers, or other employees there or elsewhere, because they support the UAW or any other union.

(f) Subcontracting work from a department or unit at Jacksonville, Texas, or elsewhere, where the employees are organizing and supporting the UAW, or any other union, when the purpose of the subcontracting is to prevent a possible bargaining obligation attaching by eliminating the work, and therefore the jobs, of the employees in the potential collective-bargaining unit.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Revoke the arrangement made, effective October 11, 1988, with Security Couriers, Inc. (SCI), a wholly owned subsidiary, by which EDS subcontracted its courier work from its Jacksonville, Texas facility to SCI at Tyler, Texas.

(b) Restore at Jacksonville, Texas, the courier work subcontracted effective October 11, 1988, to SCI-Tyler, including any increase in that work since October 11, 1988. To the extent such restoration and resumption must comply with the Texas Motor Carrier Act, take all steps necessary to effect that compliance.

(c) On reestablishing the courier work at Jacksonville, restore the extra 15-minute paid working time unlawfully removed from the Jacksonville courier drivers in September 1988.

(d) Offer all Jacksonville courier drivers terminated on October 11, 1998, including the 15 named below, immediate and full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of

earnings (including the September 1988 reduction by 15 minutes in paid working time) and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision:

Bonnie G. Barnes	Larry Reagan
Queen E. Chumbley	Walter P. Stanwood Jr.
Margaret Hendricks	Nila Scully
Martha J. Lance	Daniel R. Schultz
James C. Mell	Charles Samples
Ray Myrick	Clayton White
A. L. McDaniel	Kenneth Wheeler
Shawn D. Nock	

(e) Remove from its files any reference to the unlawful discharges, and to the unlawful formal written disciplinary notice issued to Jacksonville courier Walter Paul Stanwood Jr., and notify each employee in writing that this has been done and that the discharges and written warning will not be used against them in any way.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its facility in Jacksonville, Texas, copies of the attached notice marked "Appendix A."²⁸ Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

B. The Respondent, Security Couriers, Inc. (SCI), a wholly owned subsidiary of EDS, Tyler, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling terminated EDS-Jacksonville employees that they were discharged and denied transfer to and employment at SCI-Tyler because of the union activities at EDS-Jacksonville.

(b) Coercively interrogating terminated EDS-Jacksonville employees, present at SCI-Tyler to interview for employment, about their sentiments regarding the UAW or any other union.

(c) Telling terminated EDS-Jacksonville employees, present at SCI-Tyler to interview for employment, that SCI does not want the UAW, or any union, at Tyler, when the context of such remark implies that SCI would discriminate against union supporters.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

²⁶ See the format in *Storer Communications*, 297 NLRB 296 (1989).

²⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

²⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its facility in Tyler, Texas, copies of the attached notice marked "Appendix B."²⁹ Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are

customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that paragraphs 9(a)(1), (b)(1), 10, 12, 16, and 17 are dismissed from the paragraph numbers enumerated in complaint conclusionary paragraphs 18, 19, and 20.

²⁹ See fn. 28, supra.